Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERT G. MACLEOD,
Petitioner,

v.

GEORGETOWN UNIVERSITY
MEDICAL CENTER, *et al*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trial court's failure to provide notice to a *pro se* litigant of his procedural obligations under Rule 56--to respond to a motion for summary judgment with countering affidavits--violates his due process rights under the Fifth Amendment where the *pro se* litigant expresses to the trial court a fundamental misunderstanding of his obligation to conform to that rule.

2. Whether a trial court, which provides notice to *pro se* prisoners of their obligations to respond to a motion for summary judgment under Rule 56, but fails to do so for *pro se* non-prisoners, invidiously discriminates against *pro se* non-prisoners in violation of the equal protection component of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Georgetown University Medical Center, Dr. James A. Richardson, and Dr. Thomas O. Stair were defendants-appellees below and are respondents in this proceeding.

Petitioner's wife, Emine MacLeod, appeared as a plaintiff in the Superior Court below, but voluntarily withdrew her complaint and is no longer a party to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Albert G. MacLeod respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the appellate court is published at 736 A.2d 977 and attached at App., *infra*, 1a-14a. The opinion of the trial court is unpublished and attached at App., *infra*, 15a-19a.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1999. App., *infra*, 1a. An application for an extension of time within which to file a petition for a writ of certiorari was presented to the Chief Justice, who on November 5, 1999, extended the time to and including December 7, 1999. App., *infra*, 22a-23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "nor [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT

The fundamental questions that this case presents concerning summary judgment arise out of a medical malpractice action.

The Petitioner went to Respondents complaining about a pain in his ear. App., *infra*, 15a. In the emergency room,

Respondents attempted to remove the wax, but Petitioner requested that they stop because of an enormous pain being caused by the procedure. *See* C.A. App. at 21, 28, 60. Respondents refused and continued the procedure that punctured Petitioner's left ear causing permanent tinnitus, i.e. a permanent ringing in his ear. *See* Appellant's Brief at 2-3; C.A. App. at 28, 59-61. Petitioner went to two treating physicians, including an ear specialist who Petitioner intended to call at trial to testify at trial, who reported that Respondents had committed medical malpractice and were responsible for the permanent tinnitus that he had to endure for the rest of his life. *See* Appellant's Brief at 4; C.A. App. at 57, 59-61, 69 ("Pat[ient] had blockage of ears. [He] went to Georgetown E.R. [had his] left ear syringed [and "canal excoriated"] by E.R. M.D. Pat[ient] had sudden severe pain and bleeding. Now has tinnitus.").

After attempts to settle the case failed, Petitioner, an indigent litigant, filed a lawsuit claiming medical malpractice. App., *infra*, 2a. Because Petitioner was proceeding *pro se*, the trial court provided Petitioner with a handbook. App., *infra*, 6a n.5. The handbook stated that the rules of civil procedure are "complex," and then offered assistance concerning procedural issues. App., *infra*, 20a. However, with regard to opposing Respondents' motion for summary judgment, the handbook advised Petitioner *only* the following information quoted *in its entirety*:

> If you wish to oppose a party's motion, the opposition must be accompanied by the following:
>
> (1) On a separate page, reasons and/or case law to support your opposition (referred to as Memorandum of Points and

Authorities);

(2) A proposed order for the judge to sign;

(3) A statement called a "Certificate of Service" [followed by description of requirements].

(4) Chambers copy for the assigned judge. [Followed by directions for doing so.]

Id.

Respondents moved for summary judgment with accompanying expert affidavits, arguing that Petitioner could not satisfy the required elements of a medical malpractice claim. App., *infra*, 18a. In opposing the Respondents' motion, Petitioner acknowledged the substantive elements that he needed to prove in order to prevail on a medical malpractice claim. App., *infra*, 19a. Petitioner contended, just as the Court *pro se* booklet instructed, that he was disputing the conclusion that the Respondents had not committed medical malpractice based, in part, on the opinions of his treating expert doctors. *Id.* Further, he stated that he believed under Rule 56 he had done all that he needed to defeat the motion. *Id.* Accordingly, he expressly stated that he was unwilling to provide the testimony of these doctors at this time and intended to wait to do so at trial, because he believed that since he disputed Respondent's contentions under Rule 56, he had a right to wait until that time to introduce that evidence. App., *infra*, 16a, 19a (emphasis added) ("Plaintiff argues that he is permitted to cross-examine the defendants' expert witnesses in order to establish a violation of the standard of care. . . . Plaintiff further states, 'It seems that Defendants wish to hold the entire trial right now and forcefully compel me to divulge every ounce of evidence and strategy that

I intend on using at trial. I will not do that. *Nor do I believe that I am obligated to do that in order to oppose a motion for summary judgment.*").

Neither the Respondents' opening brief nor reply brief in support of their motion for summary judgment stated nor set forth any part of Rule 56, let alone stated or explained Petitioner's obligations to provide his medical opinions in the form of affidavits. *See* C.A. App. at 23-27, 66-71. The only reference to Rule 56 was a boilerplate reference in the Motion for Summary Judgment stating that the motion was "pursuant to Civil Rule 56(c)." C.A. App. at 17. Moreover, the trial court failed to provide Petitioner notice of his obligations in responding to a summary judgment motion. App., *infra*, 4a. On the contrary, the trial court awarded summary judgment in favor of the Respondents because Petitioner had failed to come forward with expert affidavits to rebut the affidavits offered by the Respondents concerning the required elements for a medical malpractice claim. *Id.* Significantly, the trial court did so even though it expressly acknowledged that Petitioner was operating under a misapprehension of the summary judgment procedures, i.e., that he could wait until trial before presenting his experts and evidence. App., *infra*, 16a, 19a. Moreover, the trial court did not give Petitioner leave to provide the expert affidavits or suggest that Petitioner could do so under a motion for reconsideration. App., *infra*, 15a-19a. Similarly, the *pro se* handbook did not include any reference to a Rule 60 motion or the concept of filing a motion for reconsideration of any kind. App., *infra*, 20a.

On appeal, the District of Columbia Court of Appeals affirmed the trial court's granting of summary judgment. App., *infra*, 14a. The appellate court relied almost entirely, if not exclusively, on federal law in affirming the trial court's decision. App., *infra*, 6a-14a. The appellate court recognized that several

federal circuit courts, including the D.C. Circuit, consistently have held that *pro se* plaintiffs have been afforded leniency in procedural matters in general, and have required Rule 56 notice to *pro se* parties in particular. App., *infra*, 6a-10a n.9. However, rejecting Petitioner's due process argument "that notice is essential to ensure a meaningful opportunity to be heard," the appellate court held that the trial court was not required to provide Rule 56 notice to Petitioner, and further, criticized Petitioner for complaining about the trial court's *pro se* handbook being misleading because the trial court had made a genuine effort to be helpful. App., *infra*, 6a n.5, 14a.

Moreover, in rejecting Petitioner's equal protection argument, the appellate court acknowledged that the trial court provides Rule 56 notice to *pro se* prisoner litigants, but nevertheless it was not required to provide such notice to *pro se* non-prisoner litigants. App., *infra*, 9a-11a. It therefore held that the trial court did not commit error in failing to provide Petitioner with notice of his Rule 56 requirements in opposing a motion for summary judgment. App., *infra*, 14a. In reaching its holding, the appellate court failed to establish a compelling state interest for discriminating against *pro se* non-prisoners. *See* App., *infra*, 6a-14a. Furthermore, the appellate court's articulation of its justification for this distinction is inconsistent with federal circuit decisions that demonstrate that the purported justification is without merit, and inconsistent with empirical findings made by the United States Attorney General, among others. *See* App., *infra*, 9a-11a; *see also* Section II, *infra*, 18.

REASONS FOR GRANTING THE WRIT

In conflict with federal circuits' interpretation of the Constitution, the District of Columbia Court of Appeals held in this case that Petitioner, a *pro se* non-prisoner litigant, is not

entitled to notice of his obligations to file countering affidavits when responding to a motion for summary judgment, even though the trial court provided him with misleading information about what he is required to do to oppose the motion, and he subsequently expressly declared his misunderstanding of these obligations to the trial court. In addition, the appellate court acknowledged that the District of Columbia requires that the very Rule 56 notice that Petitioner seeks be provided to *pro se* prisoners, but held that such notice is not required for *pro se* non-prisoners. The appellate court's holdings contravene established principles of justice in violation of Petitioner's constitutionally-protected rights.

Two questions are presented in this case, and on both, the federal courts of appeals are deeply divided and in considerable analytic disarray.

Moreover, the questions presented all involve recurring issues in the lower courts, as demonstrated by the plethora of reported appellate decisions. This Court should grant certiorari to the settle the circuit split and provide much needed guidance to the lower courts on common but perplexing questions that consume considerable judicial and governmental resources.

I. The United States Constitution requires the government to ensure that all litigants receive due process in the administration of their judicial proceedings. *See* U.S. Const. amends. 5 and 14.[1] It is well settled that the Due Process Clause of the

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[1] The Fifth, not Fourteenth Amendment, applies to the District of Columbia. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Nevertheless, this Court's precedents under the Fourteenth Amendment apply with equal force to the Fifth Amendment. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S.

Constitution guarantees all litigants "an opportunity [to be heard] which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). It is equally well settled that such an "opportunity to be heard" requires that a party receive adequate notice of what is necessary in order that he may participate in a meaningful way at the hearing. *See id.* at 550 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

Petitioner contends, and federal circuit courts and commentators agree, that a court's failure to provide Rule 56 notice to *pro se* parties deprives them of the right to meaningful access to the courts required by the Constitution, and in fact, there is a need for Supreme Court review because there are substantial numbers of *pro se* parties whose rights have been lost because of their lack of understanding of procedural requirements in general, and Rule 56 in particular. *See, e.g.*, *Neal v. Kelly*, 963 F.2d 453 (D.C. Cir. 1992); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982) (Posner, J.); *see also* Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659, 671 (1988); McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 Fordham L. Rev. 1109, 1116 (1987). Thus, without such notice being provided, the *pro se* litigant is effectively denied his due process rights under the Fifth Amendment.

636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.")

II. The United States Constitution requires all states, including the District of Columbia, to ensure that litigants receive equal protection of the law in the administration of judicial proceedings. *See* U.S. Const. amends. 5 and 14.[2] This necessarily prevents the states from implementing procedures that will result in "invidious discriminations between persons and different groups of persons." *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). This imposes upon the states an obligation to ensure that these judicial processes are "kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

This Court's case law confirms the principle that a distinction "between different persons and groups of persons" that implicates a fundamental right can only be sustained if it is absolutely necessary to effectuate a compelling state interest. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). The right of access to the courts is fundamental to all persons, *pro se* or represented, incarcerated or free. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977).

Thus, under the Fifth Amendment's equal protection component, the same Rule 56 procedural protection the District of Columbia courts afford a *pro se* prisoner must be afforded a *pro se* non-prisoner like Petitioner, unless the District of Columbia can make the necessary showing of a compelling state interest that justifies this discrimination. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Here neither the Respondent nor the appellate court can, or did, demonstrate that the District of Columbia has an compelling state interest in providing Rule 56

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[2] *See* n.1 *supra*. Implicit within the Fifth Amendment's Due Process Clause is an equal protection component. *Bolling*, 347 U.S. at 500.

notice only to *pro se* prisoners, but not *pro se* non-prisoners.

Furthermore, even if this Court concludes that a fundamental constitutional right were not implicated here, Petitioner's rights under the equal protection claim are still violated unless the District of Columbia can demonstrate a rational basis for discriminating against *pro se* non-prisoners. *See Rodriguez*, 411 U.S. at 40. Here, the appellate court claimed that *pro se* prisoners suffer more hardships than non-prisoners, and therefore need more leniency. App., *infra*, 10a. However, other federal circuit courts disagree that there is any justification for treating these two classes of persons differently and hold that the rationale behind such a distinction fails as an empirical matter. There is overwhelming evidence which undermines the appellate court's contention that incarceration necessarily imposes more "handicaps" on *pro se* prisoner litigants compared to *pro se* non-prisoner litigants in the context of responding to a motion for summary judgment.

The fact of the matter is that both prisoner and non-prisoner *pro se* litigants alike share the common "handicap" of a profound inability to decipher their procedural obligations under Rule 56. Any distinction favoring the provision of Rule 56 notice to incarcerated *pro se* litigants, but not non-prisoner litigants, is a *prima facie* violation of the equal protection component of the Due Process Clause of the Fifth Amendment, and must be struck down as such so that *pro se* non-prisoner litigants receive the same Rule 56 notice.

I. WHETHER DUE PROCESS REQUIRES TRIAL COURTS TO PROVIDE *PRO SE* LITIGANTS WITH NOTICE OF THEIR PROCEDURAL OBLIGATIONS IN RESPONDING TO A SUMMARY JUDGMENT MOTION IS AN IMPORTANT AND UNSETTLED QUESTION.

For over ninety years, this Court has recognized the importance of a right of access to the courts which is protected by the Constitution. *See, e.g., Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). In recent decades, this Court has expressly extended the scope of this right of access to include all persons, be they indigent or not. *See, e.g., Bounds*, 420 U.S. at 828; *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

The constitutional nature of this right was best stated in *Armstrong*, 380 U.S. at 552, where Justice Stewart, expressing the views of a unanimous Court, wrote:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that *at a minimum they require* that deprivation of life, liberty or property by adjudication be *preceded by notice and opportunity for hearing appropriate to the nature of the case. . . . A fundamental requirement of due process is the opportunity to be heard.* It is an opportunity which *must be granted at a meaningful time and in a meaningful manner.*

380 U.S. at 552 (emphasis added). For *pro se* litigants, the right of access guarantees all the means necessary to ensure an adequate hearing on all alleged grievances. *See Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (*per curiam*), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (*per curiam*).

As this Court has consistently recognized, "the Due Process Clauses [of the Fifth and Fourteenth Amendments] protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 (1982). In so doing, this Court also recognized that, "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428 (citing *Mullane*, 339 U.S. at 306). To that extent, the Fourteenth Amendment's Due Process Clause has been interpreted "as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed [rights].'" *Id.* at 430 (alteration in original) (citing *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)).

The most rudimentary demands of due process require that "in any proceeding which is to be accorded finality," notice must be given that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong*, 380 U.S. at 550 (citing *Mullane*).

Petitioner claims that the constitutional right of access to the courts under the Due Process Clause of the Fifth Amendment requires that Rule 56 notice be given to all *pro se* parties, because without this notice, the State deprives the *pro se* party of his constitutionally-protected due process rights and thus causes him to forfeit his constitutional right of access to the courts and an opportunity to be heard in a meaningful manner. This contention is supported by federal circuit case law (although there is a clear split, *infra* at 16-17) and commentators.

For example, one commentator argues that the holding of this Court in *Haines v. Kerner*, 404 U.S. 519 (1972), should be extended to other procedural contexts as well. *See* 55 U. Chi. L. Rev. at 671. In that case, this Court held that strict compliance with procedural rules that would require the dismissal of a *pro se* litigant's complaint was improper because it denied that plaintiff the opportunity to have the merits of his complaint decided on substantive grounds. *See Haines*, 404 U.S. at 520-21. To limit the *Haines* holding to leniency in the context of construing a complaint would be to allow a litigant "an opportunity to offer proof" (*id.* at 521), only to enforce strict compliance in other procedural matters that are "contrary to lay intuition" (*Lewis*, 689 F.2d at 102) and would result in the same dismissal of the *pro se* litigant's case that the *Haines* Court feared in the first place. 55 U. Chi. L. Rev. at 672. Thus, just as the *Haines* Court recognized that a refusal to construe pleadings flexibly is tantamount to a withdrawal of a meaningful opportunity to be heard, that same reasoning requires a recognition that a person's *pro se* status "should not be used to determine (or terminate) [his] procedural due process rights" in other contexts as well. *Id.* at 683. Such a deprivation of Petitioner's procedural due process rights occurred where the lower court failed to provide notice of his procedural obligations under Rule 56, particularly where the trial court provided misleading information and the Petitioner offered an opposition consistent with that information that resulted in the dismissal of his claim.

Another commentator argues that a long established line of holdings issued by this Court, dating back to 1907 with *Chambers*, 207 U.S. at 148, guarantees to all litigants a right of access to the courts, and necessarily requires the guarantee of a meaningful opportunity to be heard. *See* 55 Fordham L. Rev. at 1116. This commentator explains that service of a motion for summary judgment does not adequately advise a *pro se* litigant

of his duty to submit affidavits in opposition. *Id.* at 1118. "Because *pro se* litigants cannot discern their summary judgment obligations adequately from Rule 56, the *pro se* litigant's right of access to the courts can be safeguarded only by imposition of a notification rule as a constitutional minimum." *Id.* at 1137. Otherwise, a failure to do so "thwarts the *pro se* litigant's [constitutionally-protected] right of access to the courts." *Id.*

Indeed, Judge Posner for the Seventh Circuit takes to task those critics of a Rule 56 notice requirement to *pro se* parties, because they fail to account for the lack of knowledge and lay intuition of *pro se* parties about the trial process:

> The lack of notice [regarding the requirement of submitting countering affidavits] would not be troubling if it were obvious to a layman that when his opponent files a motion for summary judgment supported by affidavits he must file his own affidavits contradicting his opponent's if he wants to preserve factual issues for trial. But this aspect of federal civil procedure practice is *contrary to lay intuition* . . . . It would not be realistic to impute to [a *pro se* litigant] . . . an intellectual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial. . . . *We do not think that [a pro se plaintiff] can be charged with the . . . knowledge that a failure to offer affidavits when his opponent files something called "Motion to Dismiss, or in the Alternative, For Summary Judgment," is an equivalent default.*

Lewis, 689 F.2d at 102 (emphasis added).

In addition, several federal circuit courts have recognized, implicitly or explicitly, that notice of these requirements is required by the Constitution. For example, in *Lewis*, 689 F.2d at 101, Judge Posner noted that "a district court cannot properly act on a motion for summary judgment without giving the opposing party a reasonable opportunity to submit [countering] affidavits." To that extent, he stated that "*reasonable opportunity presupposes notice*." *Id.* at 102 (emphasis added).

In *Neal*, 963 F.2d at 453, the D.C. Circuit similarly recognized that a litigant, in opposing a motion for summary judgment, must be given "*reasonable opportunity* to present all material made pertinent" to that motion. (emphasis added) Significantly, that court ascribed to the position taken by the Seventh Circuit in *Lewis*, that "*reasonable opportunity presupposes notice*." *Neal*, 963 F.2d at 456 (emphasis added).

Admittedly, the *pro se* litigants in both *Lewis* and *Neal* were incarcerated. However, as the D.C. Circuit's holding in *Moore v. Agency for Intern. Development*, 994 F.2d 874, 876 (D.C. Cir. 1993) makes clear, those holdings were not limited to *pro se* prisoners, and the reasoning in those cases applies with equal force to *pro se* non-prisoners. "[W]e believe the principle established in [*Lewis*, that reasonable opportunity presupposes notice,] applies equally here." *Id.* Citing *Neal*, the *Moore* court stressed the importance of "providing *pro se* litigants with the necessary knowledge to participate effectively in the trial process." *Id.* This is necessary in order to ensure the *pro se* litigant his constitutionally-protect right of meaningful access to the courts.

Similarly, the Seventh Circuit in *Timms v. Frank*, 953 F.2d 281 (7th Cir. 1992) expressly held that the need for the court's Rule 56 notice required by *Lewis* applied with equal force to *pro se* non-prisoners. The Court stated "we believe that all *pro se*

litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion. . . . [T]his notice should include both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the district court unless the non-movant contradicts the movant with counter-affidavits." *Id.* at 285.

This requirement of Rule 56 notice to a *pro se* non-prisoner litigant was recently reaffirmed in *Vital v. Interfaith Medical Center*, 168 F.3d 615, 620 (2d Cir. 1999). In that case, the *pro se* litigant had responded to a motion for summary judgment, but had not submitted his assertions in affidavit form. As a result, the district court granted summary judgment against him. The Second Circuit began its discussion by noting its general rule that "the failure of a district court to apprise *pro se* litigants of the consequences of failing to respond to a motion for summary judgment is ordinarily grounds for reversal." *Id.* Recognizing the essential nature of the notice requirement, the Second Circuit held that "[w]here the proper notice was not given, the mere fact that the *pro se* litigant made some response to the motion for summary judgment is not dispositive where neither his response nor other parts of the record reveal that he understood the nature of the summary judgment process." *Id.* at 621. As such, the Second Circuit stated that "[i]n the absence of explicit notice from the District Court or an opposing party, the nature of the papers submitted by the litigant and the assertions made therein as well as the litigant's participation in proceedings before the District court may assist in determining whether the *pro se* litigant had such an understanding." *Id.*

Shortly after the *Vital* decision, the Second Circuit was faced with another case bearing remarkable factual resemblance to the instant case. *See McPherson v. Coombe*, 174 F.3d 276 (2d Cir. 1999). In that case, McPherson, a *pro se* litigant, was

faced with a motion for summary judgment. In his opposition papers, McPherson, just as Petitioner in the instant case, expressly manifested his misunderstanding of the Rule 56 requirements. Specifically, he stated that he would come forth with the requisite evidence at trial and asserted in his opposition papers that he had done all that was necessary to satisfy the summary judgment rule. *Id.* at 281. In regard to this statement, the Second Circuit noted that "[w]hile this makes clear that McPherson had some awareness as to what summary judgment entails, we are unable to conclude that he understood that in order to oppose summary judgment Rule 56 requires that he submit (rather than just identify) the affidavits and other documentary evidence that supports his claim." *Id.* As such, that court held that "absent a clear indication that the *pro se* litigant understands the nature and consequences of Rule 56 -- as is required under *Vital* and which we reiterate today -- he or she must be so informed by the movant in the notice of motion, or failing that, by the district court." *Id.*

For failure to provide such notice, both the Seventh Circuit in *Lewis*, the D.C. Circuit in *Neal* and *Moore*, and the Second Circuit in *Vital* and *McPherson*, held that the lower court committed reversable error by failing to provide such notice and remanded the case with instructions that such notice be given. *See also Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988) (reversing award of summary judgment against *pro se* litigant and remanding for further proceedings because "a *pro se* party is entitled to notice of the consequences of failing to respond to . . . a motion of summary judgment"); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (reversing award of summary judgment against *pro se* plaintiff who was not given notice of the consequences of failing to respond because "a *pro se* plaintiff is entitled to such a reasonable safeguard when confronted with the possibility of summary disposition of his case").

However, in *Jacobsen v. Filler*, 790 F.2d 1362, 1368 (9th Cir. 1986), the Ninth Circuit, over a vigorous dissent, became the first federal circuit court to limit the need to provide Rule 56 notice to only *pro se* prisoners. Two years later, the Sixth Circuit held that *Jacobsen* did not go far enough and held that all *pro se* parties, both prisoners and non-prisoners alike, were not entitled to any Rule 56 notice at all. *See Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988). Subsequently, in a prisoner *pro se* case, the Fifth Circuit followed the Sixth Circuit and outright rejected a right to any Rule 56 notice. *See Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir. 1992).

This undeniable split of authority requires this Court's review in order to provide guidance to these courts on what procedural protections must be afforded *pro se* litigants to ensure that their due process right of access to the courts is guaranteed.

Petitioner seeks this Court's recognition that, at a constitutional minimum, he was entitled to notice of his procedural requirements in order to preserve his right of access and meaningful opportunity to be heard. In addition to the clear lack of any notice to Petitioner, the situation was exacerbated by the fact that the trial court provided a handbook that was irrefutably deceptive and misleading as it inaccurately described his obligations in opposing Respondent's motion for summary judgment.

Petitioner recognizes that, when determining the specific dictates of due process, this Court has instituted a balancing test of the various interests involved. *See Matthews*, 424 U.S. at 331. In this connection, Petitioner contends that in undertaking to balance the relevant interests, the Court should take note of the fact that the cost to the State of providing notice of a *pro se*

litigant's summary judgment obligations is *de minimis* at best. All that is required is that the trial courts provide written notice to the *pro se* litigants upon receipt of a motion for summary judgment just as, for example, the district courts in the Second and Seventh Circuits have done following *Sellers* and *Lewis*. *See* App., *infra*, 24a and *Czajkowski v. City of Chicago*, 810 F. Supp. 1428, 1441-42 (N.D. Ill. 1992). These simple notices adequately inform *pro se* parties of their obligations under Rule 56, and thereby would suffice in protecting their constitutionally-protected right of access to the courts and a meaningful opportunity to be heard as guaranteed by the Due Process Clause of the Fifth Amendment.

The well documented "flood" of *pro se* litigants to the courts draws further support for the pressing need that this Court take this case and ensure the protection of those litigants' rights. *See* Engler, *And Justice for All - Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999) ("unrepresented litigants are flooding the courts"). The explosion of *pro se* litigation has steadily continued since the Attorney General reported in 1994 that "at least eighty percent (80%) of the poor and working poor in the United States do not have access to legal services." The Honorable Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 Fordham L. Rev. 5, 8 (1994). *Id.* This fact is significant to administration of the courts nationwide and directly implicates the need for this Court to guarantee the proper administration of justice to these numerous unrepresented litigants. Without resolution, the number of *pro se* litigants whose due process rights are overlooked on a daily basis will continue to swell without bounds.

Moreover, concerning the administration of justice, the

recent explosion of *pro se* litigants is significant because this Court's "rules of procedure are based on the assumption that litigation is normally conducted by lawyers," *McNeil v. United States*, 508 U.S. 106, 113 (1993), and comprehensive reports on *pro se* cases have found that *pro se* litigants are at a serious disadvantage when seeking relief in the courts against represented parties, because of the complexities of the procedural rules. *See* 55 Fordham L. Rev. at 1124 (1987) (citing parallel authority). Thus, *pro se* litigants have lost claims based solely on their inability to understand the intricacy of the rules of civil procedure. *See* 55 U. Chi. L. Rev. at 664.

The greatest significance of the explosion of *pro se* litigation and the disadvantages that they face against represented parties occurs when they are faced with a motion to dismiss or motion for summary judgment. This is self-evident because their claims can be dismissed without the court having any assurance that these claims are completely lacking in merit. *See Haines*, 404 U.S. at 519. This argument is eloquently summarized by one commentator who, stressing the *need* for a court's Rule 56 notice to *all pro se* litigants, writes:

> Failure to inform *pro se* litigants of a potentially fatal procedural requirement such as the reply affidavit requirement of the summary judgment rule dissipates the right of access and works to discourage a full hearing on the merits. Judicial notification of the requirements of the summary judgment rule provides an unburdensome method of ensuring a *pro se* litigant an adequate hearing on the merits and does not compromise the judge's role in the adversary system. *Because pro se litigants cannot discern their summary judgment obligations adequately from Rule 56*, the *pro se* litigant's right of access to the courts can be safeguarded *only* by imposition of a notification rule as a *constitutional minimum*.

55 Fordham L. Rev. at 1137 (emphasis added).

II. THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE PROHIBITS A COURT FROM GIVING RULE 56 NOTICE TO *PRO SE* PRISONERS, BUT NOT *PRO SE* NON-PRISONERS.

The equal protection component of the Fifth Amendment's Due Process Clause guarantees to all litigants freedom from "invidious discriminations between persons and different groups of persons." *Griffin*, 351 U.S. at 18. As such, the judicial processes "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi*, 384 U.S. at 310.

Under traditional equal protection analysis, a State may defend its disparate treatment of different groups of persons on the grounds that it is rationally related to a legitimate end. *See Williams v. Vermont*, 472 U.S. 14, 22-23 (1985). However, if the classification relates to a fundamental right,[3] the State has a higher burden to justify its classification and is required to show that there is a compelling state interest that can *only* be effectuated by implementation of the discriminatory policy. *See Rodriguez*, 411 U.S. at 40.

Petitioner submits that a fundamental right of access to the courts is involved in this case and as such, the District of Columbia is required to show a compelling State interest in

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[3] A right is fundamental when the Constitution explicitly or implicitly guarantees the right. *See Rodriguez*, 411 U.S. at 33-34.

order to justify its provision of Rule 56 notice to *pro se* prisoners, but not *pro se* non-prisoners. This showing has not been, and cannot be, made.

Moreover, even were the right of access to the courts not guaranteed by the Constitution, and even if failure to give notice to a *pro se* litigant of his procedural obligations under Rule 56 did not implicate a fundamental right, Petitioner submits that the District of Columbia has failed to, and cannot, adequately demonstrate that the disparate treatment in the instant case is rationally related to a legitimate end. In addition, as the appellate court below recognized, and as Petitioner has shown (in Section I, *supra*, 16-17), the federal circuit courts are split on whether *pro se* prisoners and *pro se* non-prisoners should be given the same Rule 56 notice. As such, it is imperative that this Court review the instant case to dispel this conflict, and provide much needed guidance to these courts as to providing notice and leniency to *pro se* parties, prisoners and non-prisoners alike.

A. The District Of Columbia Court of Appeals Has Failed To, And Cannot, Demonstrate A Compelling State Interest As Justification For The Unequal Treatment Of Prisoner And Non-Prisoner *Pro Se* Litigants.

The appellate court below recognized that the District of Columbia courts provide notice of a *pro se* litigant's Rule 56 obligations to *pro se* parties who are incarcerated. *See* App., *infra*, 8a, n.7. Although Petitioner was proceeding *pro se* in the trial court, the appellate court held that he was not entitled to the same Rule 56 notice because he was not a prisoner.

It is well established that the right of access to the courts is a fundamental right under the Constitution. *See, e.g., Chambers*, 207 U.S. at 148; *Bounds*, 420 U.S. at 828; *Johnson*,

393 U.S. at 485. This right is fundamental to all persons, *pro se* or represented, incarcerated or free. *See* 55 Fordham L. Rev. at 1130-31 (collecting cases). As such, a State may not defend its disparate treatment of different persons or groups of persons, in regards to the right of access, based on an argument that it is only rationally related to a legitimate end. Rather, the State bears the burden of showing that this disparate treatment is absolutely necessary to effectuate a compelling state interest because, as this Court has consistently recognized, the right of access to the courts is a fundamental right implicitly guaranteed by the Constitution. *See, e.g., Chambers*, 207 U.S. at 148; *Bounds*, 420 U.S. at 828; *Johnson*, 393 U.S. at 485.

As this Court recognized in *Matthews*, 424 U.S. at 335, the judiciary has two possible interests in imposing restrictions on the right of access: fiscal objectives and administrative objectives. In regards to a state's fiscal concern, the state's interest is not implicated by extending the provision of Rule 56 notice to non-prisoner *pro se* parties. First, judicial notification involves no substantial financial expenditures by the judiciary.[4] Second, most *pro se* parties are already accorded significant financial assistance by the judiciary. *See* 55 Fordham L. Rev. at 1131 (84% of *pro se* litigants commence civil actions without prepayment of fees). Finally, because the District of Columbia Superior Court already affords *pro se* prisoners Rule 56 notice, there is no support for the contention that advising *pro se* non-prisoners will somehow unduly drain the government's fiscal resources.

Similarly, the administrative objectives to be furthered by limiting judicial notification of summary judgment obligations to

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[4] The trial court below already supplies, at no cost, a *pro se* handbook to all unrepresented litigants.

pro se prisoners are incapable of rising to the level of a compelling interest. *See id.* The District of Columbia Superior Court already supplies *pro se* litigants with a handbook generally setting forth the litigant's obligations. Thus, all that is required is that the trial courts include a single page in their *pro se* handbooks providing a correct explanation of a litigant's obligations in opposing a motion for summary judgment or, in the alternative, provide written notice to the *pro se* litigants upon receipt of a motion for summary judgment just as the district courts in the Second and Seventh Circuits have done following *Sellers* and *Lewis*. *See* App., *infra*, 24a and *Czajkowski*, 810 F. Supp. at 1441-42.

As the Seventh Circuit noted in *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985), judicial notification of summary judgment obligations to *pro se* litigants "should alleviate injustice, without adding to the workload of the . . . court[s]." Petitioner seeks nothing more than an extension of this notice to *pro se* non-prisoners as a means of protecting their fundamental constitutional right of access to the courts. To do otherwise invidiously discriminates against *pro se* non-prisoners in violation of the Fifth Amendment's equal protection component.

In *Griffin*, 351 U.S. at 19, this Court found the specific dictates of the Equal Protection Clause as "affording equal justice to all and special privileges to none." To that extent, this Court noted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* Similarly, there can be no equal justice where the trial a man gets depends on whether or not he is incarcerated. The situation created by this distinction is especially anomalous for it entitles *pro se* convicted felons to greater rights to notice and leniency than a *pro se* law-abiding citizen asserting the identical claim. It follows, then, that a *pro se* non-prisoner is not afforded "equal

justice" where he is denied the same notice of his obligations in responding to a motion for summary judgment as a *pro se* prisoner.

In sum, because there is a profound absence of a compelling state interest in the instant case, the District of Columbia's policy of giving notice to prisoner *pro se* litigants, but not non-prisoner *pro se* litigants, violates the Fifth Amendment's equal protection component as it invidiously discriminates against non-incarcerated *pro se* litigants such as Petitioner. Indeed, the appellate court below offered no finding that there was a compelling state interest in not providing the Rule 56 notice provided to *pro se* prisoners -- because there is none.

B. The District Of Columbia Court of Appeals Has Failed To, And Cannot, Demonstrate A Rational Justification For The Unequal Treatment Of Prisoner And Non-Prisoner *Pro Se* Litigants.

As the appellate court below properly recognized, the D.C. Circuit's decision in *Hudson* "is binding on us under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)." App., *infra*, 8a n.7. In *Hudson v. Hardy*, 421 F.2d 1091 (D.C. Cir. 1968), a *pro se* prisoner litigant was faced with a motion for summary judgment. Much like Petitioner in the instant case, the plaintiff in *Hudson* was unable to discern his procedural obligations under Rule 56, and as such, the motion for summary judgment was awarded against him for failure to submit countering affidavits. *Id.* In overturning the grant of summary judgment, the appellate court stressed the fact that because "nothing in the record indicates that [the appellant] was notified that failure to respond to appellee's motion and affidavit would result in the entry of summary judgment against appellant . . . [he] was clearly not afforded an 'opportunity'" to comply with the Rule. *Id.* at 1094. As such, that court held that "before entering summary

judgment against appellant, the district court, *as a bare minimum*, should have provided him with fair notice of the requirements of the summary judgment rule." *Id.* (emphasis added).

The appellate court below distinguishes *Hudson* because that case involved a *pro se* prisoner who, "because of the handicaps . . . detention necessarily imposes on a litigant . . . has neither the facilities nor . . . the opportunity to provide the documentary evidence that would have been necessary, by ordinary standards, to defeat appellees' motion for summary judgment." App., *infra*, 10a (internal citations omitted). However, as the D.C. Circuit's decision in *Moore*, 994 F.2d at 877, makes clear, such a distinction is unfounded.

Moore was a *pro se* case brought by a non-prisoner in the D.C. District Court. Just as the appellate court below, the *Moore* court was bound by its prior holding in *Hudson*. Contrary to the appellate court's asserted distinction, the *Moore* court held that the proper application of *Hudson*'s holding applies equally to a *pro se* non-prisoner case:

> In *Hudson v. Hardy*, we held that 'before entering summary judgment against [a *pro se* prisoner] appellant, the District Court, *as a bare minimum*, should have provided him with fair notice of the requirements of the summary judgment rule.' The form of notice must be 'sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required.' *The same principle applies here* [a *pro se* non-prisoner case].

Id. at 877 (emphasis added; first alteration in original; internal citations omitted).

Nevertheless, the appellate court below drew support for the distinction between prisoner and non-prisoner *pro se* litigants on two grounds. First, it concluded that "an inmate's choice of self-representation is less than voluntary." App., *infra*, 10a. Second, it concluded that prisoners have certain "handicaps," requiring the provision of Rule 56 notice, that are not shared by non-prisoners. *Id.* As we show below, these purported justifications do not pass muster under the Constitution.

The Court's assertion that an inmate's choice of self-representation is less than voluntary necessarily implies that a non-prisoner *pro se* litigant proceeds without counsel as a matter of choice. However, the overwhelming body of evidence speaks to the contrary, and that was not the case here. Most *pro se* litigants, like Petitioner, represent themselves because of an economic inability to procure counsel. *See* 55 Fordham L. Rev. at 1133; *see also* Zeigler & Hermann, *The Invisible Litigant:; An Inside View of the Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 187 (1972) (almost all *pro se* litigants appear as such because of an inability to afford counsel). As the Attorney General for the United States pointed out, a substantial portion of American society does not have access to legal assistance in civil matters. *Supra* at 18. Therefore, any assertion that the distinction between prisoner and non-prisoner *pro se* litigants is meaningful because the latter proceeds unrepresented as a matter of choice is wrong as an empirical matter and cannot be used to justify this invidious discrimination.

The appellate court's second ground is equally unavailing. The court concluded that "an exception should be made for a prisoner unrepresented by counsel who, because of the handicaps . . . for example, his limited access to legal materials, and to sources of proof--it seems appropriate to apply the requirements of the summary judgment rule with less than 'strict

literalness'"). This distinction is again wrong as a matter of law and as an empirical matter it is wholly unjustified. For instance, incarcerated *pro se* parties are guaranteed ready access to a law library. *See Bounds*, 430 U.S. at 825-28. Further, prisoners in fact enjoy several benefits over non-prisoners in their *pro se* appearances. *See* 55 Fordham L. Rev. at 1136. As a practical matter, prisoners also have far more time to devote to pursuing their claims than non-prisoners. *See id.* (collecting cases). Additionally, permission to proceed *in forma pauperis* is extended more readily to prisoners and prisoners are given free drafting materials such as pens and paper. *Id.* (collecting cases). Furthermore, incarcerated *pro se* litigants are granted relaxed requirements for the rule of timely appeal. *See Houston v. Lack*, 487 U.S. 266 (1988). Therefore, emphasizing the handicaps of incarceration in restricting the provision of Rule 56 notice to prisoners is unjustified.

All *pro se* litigants share a common bond, an inability to discern their procedural obligations if left unassisted. *See* 55 Fordham L. Rev. at 1136. This notion is well documented and has been the basis for appointing counsel or granting leniency for *pro se* litigants throughout this Court's history. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Haines*, 404 U.S. at 520 ("we hold [the *pro se* complaint] to less stringent standards than formal pleadings drafted by lawyers"). Any assertion that non-prisoner *pro se* litigants are somehow in a better position to litigate their claims ignores the true "handicap" that all of *pro se* litigants share.

Circuit Judge Cummings, writing for the Seventh Circuit in *Timms*, at 953 F.2d at 285, eloquently summarized this issue:

> *[W]e believe that all pro se litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion* . . . . We base this decision on the rationale of *Lewis* and a belief that the attempted distinction between prisoners and other *pro se* litigants with regard to this issue is unconvincing . . . . *It would be unrealistic to impute this knowledge* [of the obligation to submit countering affidavits in a summary judgment context] *to a non-prisoner without legal training.* Further the idea that non-prisoners do not deserve notice because they have chosen to proceed *pro se* ignores the fact that most litigants who sue without a lawyer do so because they cannot afford one. *Indigent plaintiffs have no more 'freedom of choice' as to legal representation than do prisoners.* Also, even though non-prisoner plaintiffs may often be more educated than prisoners, that is no guarantee that a layman will understand the effects of failure to respond to a summary judgment motion [with countering affidavits].

(emphasis added; internal citations omitted).

Finally, it is important to recognize that, whatever handicaps incarceration may or may not impose upon a *pro se* litigant, the litigant's status as a prisoner or non-prisoner has no bearing on *pro se* litigants ability to understand their procedural obligations under Rule 56. The fact that *pro se* litigants are not incarcerated does not somehow obviate their ignorance as to these procedural requirements -- a fact that is especially noteworthy here because Petitioner expressly manifested his misunderstanding in explaining that he understood he had a right

to wait until trial to submit his doctors' testimony that would show that Respondents had committed medical malpractice. Thus, even assuming *arguendo*, that prisoners have some disadvantage not shared by *pro se* non-prisoners, Petitioner submits that they do not justify the discrimination here.

In sum, to provide notice to prisoner *pro se* litigants, but not non-prisoner *pro se* litigants, ignores the reality that all *pro se* parties suffer from the same "handicaps" of an inability to understand their procedural obligations under Rule 56. Significantly, though, such a distinction deprives the latter of their equal protection rights and impairs their ability to obtain meaningful access to the courts. As such, there is no rational basis to provide Rule 56 notice to *pro se* prisoners, but not to non-prisoner *pro se* litigants such as Petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1999

APPENDIX A

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-CV-1678

IN THE MATTER OF:

GEORGETOWN UNIVERSITY MEDICAL CENTER,
Appellee,

APPEAL OF:

ALBERT G. MACLEOD,
Appellant.

Appeal from the Superior Court of the
District of Columbia.

(No. 97-CV-1678 – Russell F. Canan, *Trial Judge*)

ARGUED MARCH 30, 1999 – DECIDED AUGUST 19, 1999

Before STEADMAN, SCHWELB and FARRELL, *Associate Judges.*

STEADMAN, *Associate Judge*: In this medical malpractice case, appellant sued for ten million dollars for permanent damage to his left ear allegedly resulting from negligent wax removal by physicians at Georgetown University Medical Center. Appellant proceeded *pro se* in this matter throughout the trial court proceedings. The trial judge granted the defendants' motion for summary judgment. Appellant now appeals with counsel to this court. The essence of his appeal is that because he was a *pro se* litigant, the court had the duty to apprise him of the defects in his opposition to the defendants' summary judgment motion and, in particular, of the importance of filing controverting affidavits. We conclude that in the circumstances here the court had no such mandatory obligation. We affirm the summary judgment.

I. Facts

Appellant filed his complaint in June 1996. An initial status conference took place in October 1996. Appellant was granted numerous extensions by the court to effect service of process and to respond to defendants' discovery requests. A scheduling order, signed January 24, 1997, allowed a discovery period ending July 24, 1997. Defendants submitted their witness list on April 24, 1997, the same day appellant served his interrogatories and requests for admissions. Appellant's 26(b)(4) statement was timely filed on May 8, 1997. It listed four physicians, including the two defendant-physicians, as "expert witnesses." Appellant's statement did not otherwise comply with the rule as to the substance of the expected testimony.[1]

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[1] The statement shall "state the subject matter in which the expert is expected to testify and . . . the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for such opinion." Super. Ct.

On July 23, 1997, defendants filed a straightforward motion for summary judgment, specifically citing to Super. Ct. Civ. R. 56(c). The motion gave a clear explanation of what the case lacked. In the motion papers, the defendants noted that contrary to the requirements of Rules 16 and 26(b)(4), plaintiff had failed to identify the substance of the expert testimony. They argued that to make out a case of medical malpractice, the plaintiff had to produce expert testimony which established the applicable standard of care, a breach thereof, and resulting injuries. Affidavits were attached from each of the four experts named by plaintiff. Each affidavit stated that no breach of any standard of care had occurred or caused appellant's injuries. Thus, the motion asserted, there simply was no competent evidence to support the naked allegation that the defendants' care was negligent and incompetent, nor that the alleged injuries were causally related to the treatment rendered by defendants.

In his response, appellant displayed his awareness of the required elements of proof for a medical malpractice claim.[2] Appellant further recognized the need for expert testimony. He asserted in his response that he would prove his case generally through cross-examination of the four doctors who had submitted affidavits, and that he would also make use of his treating physicians, whom he had previously designated as fact witnesses. The appellant stated in his reply that he "believes that he has shown sufficient evidence supporting

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Civ. R. 26(b)(4). An earlier witness list under Rule 16 had been filed April 28, 1997 and included two other treating physicians as "fact witnesses."

[2] Appellant stated "I intend on proving that there indeed was a breach of the standard of care alleged in this lawsuit, and and [sic] causation, due to the negligence of the Defendants."

the claimed factual dispute." Nowhere, however, did he set forth with any specificity, even in his own words, the subject matter on which these expert witnesses were expected to testify or the substance of the facts they would relate or of the opinions that they would express to prove his case, much less attach any affidavits or other statements from the experts themselves.[3] In a surreply submission,[4] he stated that "it seems that Defendants wish to hold the entire trial right now and forcefully compel me to divulge every ounce of evidence and strategy I intend on using at trial. I will not do that. Nor do I believe I am obligated to do that in order to oppose a motion for summary judgment."

In a careful six-page order, the trial court addressed all of these arguments by appellant, but concluded that the defendants were entitled to summary judgment. The court quoted the Rule 56(e) requirement that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial." It noted that plaintiff had simply stated, without documentation or other support, that his experts would testify on the necessary elements; the plaintiff had offered no evidence on how his claims were supported, but instead made only conclusory allegations, insufficient as a matter of law.

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[3] In his surreply, appellant offered an exhibit from one of the physician's medical records which he purported would contradict the affidavits, but which the trial court correctly observed did no such thing.

[4] Defendants filed a motion for summary judgment, appellant filed an opposition, defendants filed a reply to the opposition, and appellant filed a surreply. These submissions extend over sixty pages of the record.

II. Analysis

Plainly the trial court was correct in granting summary judgment on the basis of the record before it. The only issue is whether, before doing so, the court itself had an obligation to point out to appellant the deficiencies in his opposition. Appellant claims in particular that the trial court was obligated to advise the appellant that he must produce affidavits from his proposed expert witnesses.

Parties in litigation may of course represent themselves. We have, however, often reiterated the general principle that "such a litigant can expect no special treatment from the court." *Abell v. Wang*, 697 A.2d 796, 804 (D.C. 1997). "He must not expect or seek concessions because of [his] inexperience and lack of trial knowledge and training and must, when acting as [his] own lawyer, be bound by and conform to the rules of court procedure . . . equally binding upon members of the bar." *Solomon v. Fairfax Village Condominium IV Unite Owner's Ass'n*, 621 A.2d 378, 380 n.2 (D.C. 1993) (quoting *Paton v. Rose*, 191 A.2d 455 (D.C. 1963)). Other courts have similarly articulated this general proposition. Our own federal appellate circuit court, in an opinion by then Judge Scalia, has explained that "at least where a litigant is seeking a monetary award, we do not believe *pro se* status necessarily justifies special consideration (citation omitted). While such a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance." *Dozier v. Ford Motor Co.*, 227 U.S. App. D.C. 1, 6, 702 F.2d 1180, 1194 (1993). *See also Moore v. Agency for Int'l Dev.*, 301 U.S. App. D.C. 327, 329, 994 F.2d 874, 876 (1993) (the court "does not need to provide detailed guidance to *pro se*

litigants," nor does liberal treatment "constitute a license for a plaintiff filing *pro se* to ignore the Federal Rules of Civil Procedure." (internal quotation omitted)); *Mazique v. Mazique*, 123 U.S. App. D.C. 48, 52, 356 F.2d 801, 805 (1966).

This is by no means to say that *pro se* litigants must be left to fend entirely for themselves. We need not recount here the numerous steps that our trial and appellate courts have taken to assist *pro se* litigants in dealing with the judicial system.[5] And "we do not doubt that a trial judge may, without compromising requisite judicial impartiality, provide reasonable technical assistance to a *pro se* plaintiff in presenting her case." *Tyree v. Evans*, 728 A.2d 101, 105 (D.C. 1999).[6] But the line can be a delicate one for a trial

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[5] To give just one example close to home, this court has available, in both English and Spanish, an extensive hand-out entitled "Your Case on Appeal" designed especially for *pro se* appellants.

In this regard, we note appellant's argument that since the "Civil Action Information Handbook" prepared by the Superior Court and setting forth "basic information" to aid the *pro se* litigant does not contain a section on summary judgment, the trial court has a particular duty in that regard. We do not think that the commendable effort by the court to give some general aid to civil litigants can fairly be used to mandate trial courts to supplement the handbook in individual cases as a particular problem arises in the course of actual litigation.

[6] In the very same paragraph, we noted the general principle that "a *pro se* litigant's unrepresented status cannot permit her to escape the burdens imposed by the adversarial system." *Id.*

court in the context of specific litigation. Appellant seeks to have trial court action, discretionary at best, hardened into a rule of law that would compel reversal. We think this goes too far in the circumstances here.

Appellant cites us to cases in which courts have recognized special circumstances involving *pro se* litigants that warrant special care by trial courts. In matters involving pleadings, service of process, and timeliness of filings, *pro se* litigants are not always held to the same standards as are applied to lawyers. *Moore*, *supra*, 994 F.2d at 876; *Thomas v. United States*, 586 A.2d 1228, 1230 (D.C. 1991); *Wright v. Wright*, 386 A.2d 1191, 1192 n.2 (D.C. 1978). What distinguishes this category of cases is the focus on the merely technical, rather than substantive, rules of procedure.

A second category of cases in which courts may grant leeway to *pro se* litigants are those in which litigants bring suit under remedial statutes, particularly those involving civil rights, which rely "largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings." *Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A.2d 1293, 1299 (D.C. 1990). *See also Karriem v. Gray*, 623 A.2d 112, 114 (D.C. 1993); *Johnson-El v. District of Columbia*, 579 A.2d 163, 166 (D.C. 1990); *Love v. Pullman Co.*, 404 US. 552, 527, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972) ("Procedural technicalities are particularly inappropriate in such a statutory scheme"); *Coles v. Penny*, 174 U.S. App. D.C. 277, 283, 531 F.2d 609, 615 (1976); *Rubin v. O'Koren*, 621 F.2d 114, 117 (5th Cir. 1980).

Further, in the case of incarcerated litigants,

> we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, (internal citations omitted) and have held that some procedural rules must give way because of the unique circumstance of incarceration, *see Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988) (*pro se* prisoner's notice of appeal deemed filed at time of delivery to prison authorities)

McNeil v. United States, 508 U.S. 106, 113, 124 L. Ed. 2d 21, 113 S. Ct. 1980 (1993). *McNeil* involved an incarcerated litigant claiming damages resulting from alleged medical trials performed on prisoners. While acknowledging the procedural allowance historically given prisoner litigants, the Supreme Court nevertheless stated, "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *Id.* Thus, even prisoner litigants are given less leeway in run-of-the-mill civil cases.

Appellant places particular reliance on cases involving summary judgment against *pro se* litigants, which he asserts constitute a distinct category requiring special treatment. However, each case cited by appellant in fact falls within one or more of the categories outlined above, and none of them is comparable to the case at bar. In *Hudson v. Hardy*, 134 U.S. App. D.C. 44, 412 F.2d 1091 (1968),[7] a prisoner brought a *pro se* suit against prison officials alleging cruel and unusual punishment reflecting racial and religious prejudice. The defendants filed a motion to dismiss, or in the alternative for summary judgment, and attached an affidavit showing the

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[7] This case is binding on us under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

basis for the action they had taken. The prisoner did not respond to the motion at all, much less file a counter-affidavit. The court held that before entering summary judgment, the court "should have provided him with fair notice of the requirements of the summary judgment rule." 134 U.S. App. D.C. at 47, 412 F.2d at 1094. The ruling, however, was justified on the basis of a prisoner's peculiarly difficult situation. Noting that "in the ordinary civil case, appellant's failure to reply by affidavit might have warranted the entry of summary judgment against him," the court went on to highlight the prisoner's special situation. "We have recognized, however, that the requirements of the summary judgment rule may not fairly be applied 'with strict literalness' to a prisoner unrepresented by counsel and subject to the 'handicaps . . . detention necessarily imposes upon a litigant'. . . . Appellant has neither the facilities nor has he had the opportunity to provide the documentary evidence that would have been necessary, by ordinary standards, to defeat appellees' motion for summary judgment." *Id.* (citation omitted). Subsequent D.C. Circuit cases have similarly applied the rule in the special context of prisoner litigation or its equivalent. *See Neal v. Kelly*, 295 U.S. App. D.C. 350, 963 F.2d 453, 454-55 (1992); *Ham v. Smith*, 209 U.S. App. D.C. 373, 653 F.2d 628 (1981).[8]

The Ninth Circuit places *Hudson* and its progeny in

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[8] *Hudson*, *Neal* and *Ham* are further distinguished from the instant case because in each of them, a 12(b)(6) motion to dismiss was treated as a Rule 56 motion for summary judgment. As stated in *Neal*, "under the Rule [12b], the motion is to be disposed of as provided in Rule 56 only after 'all parties [are] . . . given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" *Neal, supra*, 963 F.2d at 455.

context and explains the distinction between prisoners and nonprisoners thus:

> It is the element of "choice" which most clearly distinguishes the *pro se* prisoner cases from the suit at bar. The leading "fair notice" prisoner case, *Hudson v. Hardy* . . . concluded that an exception should be made for a prisoner unrepresented by counsel who, because of the "handicaps . . . detention necessarily imposes on a litigant" probably would be unable to retain counsel even if he had the financial means to do so. *Hudson* at 1094. The large number of published decisions involving prisoners appearing in forma pauperis support the conclusion that an inmate's choice of self-representation is less than voluntary and, when the unwilling self-representation is coupled with the further obstacles placed in a prisoner's path by his incarceration -- for example, his limited access to legal materials, *Moore*, 703 F.2d at 520, and to sources of proof, *Hudson*, 412 F.2d at 1095 -- it seems appropriate to apply the requirements of the summary judgment rule with less than "strict literalness." *Hudson*, 412 F.2d at 1094.

Jacobsen v. Filler, 790 F.2d 1362, 1365 n.4 (9th Cir. 1986).[9]

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[9] *See also Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir. 1992); *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988). There is contrary authority. For example, in *Timms v. Frank*, the court believed that "all *pro se* litigants, not just prisoners, are entitled to notice of the

The only D.C. Circuit case cited by appellant that involves a nonprisoner *pro se* litigant is *Moore, supra.* However, *Moore* dealt with, among other things, a civil rights claim of violations of due process and equal treatment in plaintiff's discharge from the government, an area we have already noted may be treated with greater liberality. Further, the case involved not summary judgment but rather defects in the pleading and service of process, also areas of permissible special consideration in *pro se* cases. As we would construe the opinion, it was in this context that the appellate court remarked, while citing to the prisoner cases, that the trial court should have given the *pro se* plaintiff minimal notice of pleading requirements and of the consequences of noncompliance.

The case before us presents a far different picture. It involves ordinary civil tort litigation seeking monetary damages. The appellant here was at liberty, he was literate, and he clearly had access to legal materials, as demonstrated by his motions and other submissions throughout discovery. Surely by the time of summary judgment plaintiff in this major civil litigation could fairly be expected to have investigated the rudiments of that proceeding and to have read the text of Rules 26(b)(4) and 56. Appellees' motion

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consequences of failing to respond to a summary judgment motion" because "the need to answer a summary judgment motion with counter-affidavits is 'contrary to lay intuition.'" 953 F.2d 281, 285 (7th Cir. 1992) (quoting *Lewis v. Faulkner,* 689 F.2d 100 (7th Cir. 1982)). The same court subsequently acknowledged, however: "To the extent *Merritt* held that 'procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel,' it cannot be considered authoritative after *McNeil.*" *Members v. Paige,* 140 F.3d 699, 702-703 (7th Cir. 1998).

papers laid out clearly what was lacking in plaintiff's presentation. Indeed to this day, even on appeal, the substance of his experts' testimony with respect to the standard of care and causation remains something of a mystery.[10] Finally, we cannot shut our eyes to the reality that, as far as this record shows, appellant chose to proceed *pro se.* Even if he could not afford to pay a retainer, appellant was presumably free to seek and retain counsel on a contingency fee basis, as plaintiffs do in most potentially meritorious personal injury cases of this type.

Appellant makes much of his comment in the surreply, quoted above in the text at note 4, as indicating his misunderstanding of the pretrial process and summary judgment. He argues that the trial court therefore had a particular duty to enlighten him before ruling on the motion. In fact, the statement as such was not entirely inaccurate, in spite of its argumentative and somewhat rhetorical language. Appellant was correct that he did not have to reveal "every ounce of evidence and strategy." But, as already indicated, this is no reason why he should not have known by this point that he had to make at least a minimal disclosure of the substance of the evidence with which he was to prove his

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[10] No Rule 60 motion for reconsideration followed the court's order, even after appellant acquired counsel in this matter within less than a year after the entry of summary judgment. Whether a party is proceeding *pro se* or with counsel, "in both cases, the remedy to the party injured by his representative's error is to move to reconsider or to set aside; it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant." *Jacobsen v. Filler, supra,* 790 F.2d at 1364-65. *Cf. Dada v. Children's Nat'l Med. Ctr.,* 715 A.2d 904 (D.C. 1998) (expert affidavit submitted with motion for reconsideration after grant of summary judgment).

case. Furthermore, the failure of a *pro se* litigant to take some particular step can almost always be ascribed to a misunderstanding of an applicable legal requirement. A litigant's making explicit that which is implicit does not change the fundamentals of our analysis; otherwise, the normal rule of judicial noninterference would be effectively nullified.

Moreover, interference by the court in civil litigation "necessarily implicates the court's impartiality and discriminates against opposing parties who do have counsel." *Jacobsen, supra,* 790 F.2d at 1365 n.7. As *McNeil* reiterates, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." 508 U.S. at 113 (quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826, 65 L. #d. 2d 532, 100 S. Ct. 2486 (1980)). Additionally, "even if a substantive notice requirement were desirable, it should be enacted through formal amendment rather than piecemeal adjudication. Rule 56's separate notice provision (compare Rule 56(c) with Rule 6(d)) and description of summary judgment (compare Rule 56(e) with Rule 12(b)) indicate that the Supreme Court and its Advisory Committee have considered the special problems raised by the summary judgment procedure and . . . concluded that the present federal rules . . . already apprise litigants of their summary judgment obligations." *Jacobsen, supra,* 790 F.2d at 1366.

A requirement of active trial court assistance has an open-ended quality to it. As *Jacobsen* points out, if the trial court should have told the *pro se* litigant of the need to file affidavits, then the next step would be that the court must explain what an affidavit is, which in turn impels a rudimentary outline of the rules of evidence, and so forth.

"To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee." *Id.* at 1366.

Finally, it is appropriate to note the special problem posed by a rule that would reverse trial court decisions for failing to provide special assistance to *pro se* litigants. Ordinarily, for plenary appellate review, a litigant claiming error must have drawn the error to the trial court's attention so that it could have been corrected without the need for an appeal.[11] If this is not done, we will review, at best, only for "plain error." Requirements that in a given situation a trial court has a mandatory duty, on pain of reversal, to assist a *pro se* litigant requires action *sua sponte* by the trial court in favor of one party to litigation. We think we must be wary in proceeding down untrod paths in this area of the law. The circumstances here, considered as a whole, warrant no such action.

Affirmed.

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[11] See note 10, *supra*.

APPENDIX B

IN THE
SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ALBERT G. MACLEOD, *et al.*	)
Plaintiffs	) **Case No.: 96-CA-5264**
	) **Calendar 9**
v.	) **Judge Russell F. Canan**
	)
GEORGETOWN	)
UNIVERSITY MEDICAL	)
CENTER, *et al.*	)
Defendants	)

ORDER

This matter comes before the Court upon consideration of the defendants' Motion for Summary Judgment, filed July 23, 1997, the plaintiff's opposition, the defendant's reply and the plaintiff's memorandum in support of opposition to summary judgment and counter-reply to defendant's reply to same motion filed thereto.

I. Factual Background

Plaintiff has filed suit against defendants Georgetown University Medical Center ("Georgetown"), Dr. James A. Richardson and Dr. Thomas Stair for alleged injuries suffered when he visited Georgetown's emergency room on June 28, 1993, suffering from an ear infection. Plaintiff alleges in his

complaint that defendants were "negligent and incompetent, during their treatment of me in the emergency room on June 28, 1993; having breached their standard of care to plaintiffs, causing great pain and suffering to plaintiffs, including permanent injury."

II. Position of the Parties

Defendants have moved for summary judgment arguing that plaintiff has failed to designate a Super. Ct. Civ. R. 26(b)(4) expert that will testify that defendants violated the applicable standard of medical care. Plaintiff lists four doctors that will testify as experts on his Rule 26(b)(4) statement: Dr. James A. Richardson, Dr. Thomas O. Stair, Dr. Michael Morris, and Dr. Roy B. Sessions. Each of these witnesses are listed in defendant's Rule 26(b)(4) statement and have provided affidavits that indicate that there was no breach of the standard of care in this case.

Plaintiff argues that he is permitted to cross-examine the defendants' expert witnesses in order to establish a violation of the standard of care. In addition, plaintiff argues that his treating physicians, Dr. Daniel Issacson and Dr. Philip James, will testify in this matter. It should be noted that plaintiff's opposition does not provide any documentation, by affidavit or otherwise, that demonstrates that he will elicit testimony regarding the standard of care from either of these doctors.

III. Standard for Summary Judgment

"To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law." *O'Donnell v. Associated General Contractor's of America*, 645 A.2d 1084, 1086 (D.C. 1994)

(citations omitted); *Galloway v. Safeway Stores, Inc.*, 632 A.2d 736, 738 (D.C. 1993) ("Summary judgment is appropriate only if there are no genuine issues of material fact in dispute and if the moving party is entitled to judgment as a matter of law."); *Young v. Sherwin Williams Co.*, 569 A.2d 1173, 1175 (D.C. 1990); *Holland v. Hannan*, 456 A.2d 807, 814 (D.C. 1983); *Nader v. Toledano*, 408 A.2d 31, 41 (D.C. 1979), *cert. denied* 444 U.S. 1078 (1980); Super. Ct. Civ. R. 56(c)).

A motion for summary judgment should be granted when "(1) taking all reasonable inferences in the light most favorable to the non-moving party, (2) a reasonable juror, acting reasonably, could not find for the non-moving party, (3) under the appropriate burden of proof." *Galloway*, 632 A.2d at 738 (citing *Nader*, 408 A.2d at 42). The party moving for summary judgment has the burden of proving that here is an "absence of material disputed issues and the right to judgment as a matter of law." *Id.* (citation omitted). That burden is satisfied by demonstrating "that there is a lack of evidence to support the plaintiff's case." *Id.*

Once a party has set forth a *prima facie* showing, the burden shifts to the non-moving party to produce specific evidence demonstrating that a genuine issue of material fact does exist and that the moving party is not entitled to judgment as a matter of law. *Spellman v. American Security Bank, N.A.*, 504 A.2d 1119, 1122 (D.C. 1986). "Conclusory allegations by the non-moving party are insufficient to establish a genuine issue of fact or to defeat the entry of summary judgment." *O'Donnell*, 645 A.2d at 1086 (quoting *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991)). *Accord Galloway*, 632 A.2d at 738.

IV. Analysis

In a medical malpractice case, the plaintiff must establish: (1) the applicable standard of care; (2) a deviation from that standard of care by the defendant; and (3) a causal relationship between that deviation and the plaintiff's injury. *Washington v. Washington Hospital Center*, 579 A.2d 177, 181 (D.C. 1990); *Oronoff v. Kuhn & Kogan. Chtd.*, 549 A.2d 728, 731 (D.C. 1988); *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619, 623-24 (D.C. 1986).

Expert testimony on each of these elements is usually required because these issues are distinctly related to a science, profession, or occupation. *Washington, supra*, 579 A.2d at 181 (citing *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987). District of Columbia law has long held that the standard of care, breaches thereof, and causation in medical malpractice actions must be proven by expert testimony. Though there are cases where the standard of care, alleged breach thereof, and causation of injury are such that lay jurors can render a verdict without the aid of expert testimony, this is not such a case. This case involves complex issues surrounding the diagnosis and treatment of the ear and are clearly beyond the ken of the average juror.

Defendants have provided affidavits of the four expert witnesses on plaintiffs Rule 26(b)(4) statement which indicate that there was no breach of the standard of care in this case. The Court agrees with defendants that plaintiff has conceded the fact that the four experts named in his opposition to summary judgment will not opine that there was a breach of the standard of care in this case nor was there a causal relationship between the injuries suffered by plaintiff and the treatment rendered.

Plaintiff's Exhibit 1, a medical record apparently prepared by

Dr. Morris, attached to Plaintiff's Memorandum in Support of Opposition, does not contradict Dr. Morris' affidavit that there was no breach in the standard of care.

Plaintiff attempts to counter this lack of proof by stating, without documentation or other support, that treating doctors, Dr. James and Dr. Issacson, will testify as to the breach in the standard of care. Plaintiff further states, "It seems that Defendants wish to hold the entire trial right now and forcefully compel me to divulge every ounce of evidence and strategy that I intend on using at trial. I will not do that. Nor do I believe I am obligated to do that in order to oppose a motion for summary judgment." Plaintiff's Memorandum in Support of Opposition, p.1.

However, when a motion for summary judgment is made and supported with affidavits, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial." Super. Ct. Civ. R. 56(e). Plaintiff offers no evidence on how his claims are supported. Rather, plaintiff offers only conclusory allegations in an attempt to support his opposition to defendants' motion for summary judgment.[1] Accordingly, under summary judgment standards, the plaintiff's claim of malpractice must fail as a matter of law.

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[1] Moreover, over objection, the Court had granted plaintiff an extension of time to respond to defendants' discovery requests. *See* Order of February 12, 1997.

APPENDIX C

Superior Court
of the
District of Columbia

CIVIL ACTIONS INFORMATION HANDBOOK

[only relevant sections included]

INTRODUCTION

[from p. 1]

As the Court continues to improve service and access to citizens, Chief Judge Eugene N. Hamilton, judges and court administrators in the Civil Division recognize the need to disseminate important information concerning filing procedures associated with civil cases. This need is greatest among litigants who are not represented by counsel - *pro se* litigants. In order to address this need, the Division has compiled the "Civil Actions Information Handbook". This Handbook is written in simplistic terms to clarify procedures that are often perplexing to the first time filer. This document is a summary of the basic information needed to assist an individual in the filing of a civil action. The handbook serves as a guide for *pro se* litigants through the often complex procedures involved in the litigation of a civil case.

OPPOSITIONS TO MOTIONS

[from p. 10]

If you wish to oppose a party's motion, the opposition should be accompanied by the following:

(1) On a separate page, reasons and/or case law to support your opposition (referred to as Memorandum of Points and Authorities);

(2) A proposed order for the judge to sign;

(3) A statement called a "Certificate of Service" that indicates the party filing the opposition has sent a copy to all opposing parties. This Certificate of Service must contain the filer's original signature, address, and telephone number; and

(4) Chambers copy for the assigned judge. This copy may be mailed to the Civil Clerk's Office for forwarding to chambers (JM-170). Please ensure that the judge's name and calendar number are placed on the opposition for proper delivery.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 5, 1999

Mr. Albert G. MacLeod
P.O. Box 42380
Washington, DC 20015

Re: Albert G. MacLeod
v. Georgetown University Medical Center, et al.
Application No. 99A383

Dear Mr. MacLeod:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on November 5, 1999, extended the time to and including December 7, 1999.

This letter has been sent to those designated on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Sincerely,

WILLIAM K. SUTER, Clerk

By
LORETTA S. RUFFIN

Loretta S. Ruffin
Assistant Clerk

NOTIFICATION LIST

Mr. Albert G. MacLeod
P.O. Box 42380
Washington, DC 20015

Mr. Eric A. Spacek
1250 Eye Street, N.W.
6th Floor
Washington, DC 20005

Clerk
District of Columbia
Court of Appeals
500 Indiana Avenue, NW
Room 6000
Washington, DC 20001

APPENDIX E

[INSERT SEAL OF NEW YORK]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NOTIFICATION OF THE CONSEQUENCES OF FAILING TO RESPOND TO A SUMMARY JUDGMENT MOTION

A motion for summary judgment seeks dismissal of some or all of the claims you have asserted in your complaint. You are hereby advised that if a motion for summary judgment is filed by the defendant(s) in the above-referenced action, any factual assertions in the defendant's affidavits will be taken as true by the District Court unless you contradict these assertions in affidavit form.[1]

---

[1] **Rule 56(e) of the Federal Rules of Civil Procedure governs the form of affidavits. It states "[s]upporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party."**

You may not simply rely on your complaint to oppose this motion. You must file a written response in opposition to this motion with the Court, and send a copy of same to opposing counsel.

Pursuant to Local Rule 7.1 of the Northern District of New York, you are required to submit the following papers in opposition to this motion: (i) a **memorandum of law** (containing relevant factual and legal argument; (ii) **one or more affidavits** in opposition to the motion and (iii) a **short and concise statement of material facts** as to which you claim there are genuine issues in dispute. **These papers must be filed and served in accordance with the time set by Local Rule 7.1.**

If you do not submit a short and concise statement of material facts as to which you claim there are genuine issues in dispute, all material facts set forth in the statement filed and served by the defendant(s) shall be deemed admitted.

If you do not respond in opposition to the motion, summary judgment, if appropriate, will be entered against you. If partial summary judgment is granted against you, the portions of your case as to which summary judgment was granted will be dismissed; there will be no trial as to those portions of your complaint. If summary judgment is granted as to your entire complaint, your case will be dismissed and there will not be any trial concerning any of the aspects asserted in your complaint.

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

(2)

No. 99-967

IN THE

Supreme Court of the United States

ALBERT G. MACLEOD,

Petitioner,

v.

GEORGETOWN UNIVERSITY MEDICAL CENTER,
JAMES A. RICHARDSON, M.D. AND THOMAS O. STAIR, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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25 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The proper legal name of Respondent, Georgetown University Medical Center, is "The President and Directors of Georgetown College."

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of the District of Columbia Court of Appeals' unanimous opinion affirming summary judgment against Petitioner in a medical malpractice suit. Petitioner had filed a common law tort action alleging Respondents, Georgetown University Medical Center, James A. Richardson, M.D., and Thomas O. Stair, M.D. (hereinafter collectively "Respondents"), had been negligent in their care and treatment of him and seeking money damages. Set forth below is a summary of the facts and a history of the proceeding.

Petitioner presented to the emergency room at the Georgetown University Medical Center complaining of left ear pain and decreased hearing since the previous day. *See* C.A. App. at 21. Upon examination of Petitioner, it was determined that his ears were compacted with cerumen (ear wax). An irrigation of the ears was attempted to remove the cerumen. *Id.* Petitioner could not tolerate this procedure, and it was stopped at his request. *Id.* Petitioner was discharged from the emergency room with a diagnosis of ear pain and possible otitis media, an infection of the middle ear. *Id.*

Petitioner had a follow-up visit with an otolaryngologist at Georgetown, Dr. Michael Morris, who was later identified by Petitioner as an expert witness. *See* C.A. App. at 38. A CT scan was obtained, which revealed an inflammatory process in the inner and middle left ear. *Id.* at 46. According to Dr. Morris, this inflammatory process was unrelated to the irrigation of Petitioner's ears undertaken in the emergency room and was consistent with the complaints made by Petitioner in the emergency room. *Id.* at 46-47. Contrary to

Petitioner's assertion in his Petition for a Writ of Certiorari (hereinafter "Pet."), at 2, Dr. Morris did not indicate Respondents had committed malpractice. *See* C.A. App. at 47. Indeed, no physician has ever so stated.

Petitioner filed a *pro se* medical malpractice claim against Respondents alleging negligence in the treatment he received in the emergency room and claiming permanent ear damage as a result. Pet. App. at 15a-16a. District of Columbia case law requires that, in the vast majority of medical malpractice cases, a plaintiff must provide expert testimony of malpractice in order to make out a prima facie case. *See, e.g., Woldeamanuel v. Georgetown University Hospital*, 703 A.2d 1243 (D.C. App. 1997). Further, pursuant to the District of Columbia Superior Court Rule of Civil Procedure 26(b)(4), during discovery Petitioner was required to file a statement detailing the opinions of his expert witnesses.

Petitioner filed a deficient Rule 26(b)(4) Statement, in which Petitioner named four experts but, in violation of Superior Court Civil Rule 26(b)(4), did not provide any information regarding the subject matter on which each expert witness was expected to testify, the substance of the facts and opinions to which each expert was expected to testify, and a summary of the grounds for each such opinion. *See* C.A. App. at 38. Subsequently, Respondents filed a motion for summary judgment under Superior Court Rule 56. In their motion, Respondents gave a clear explanation of what the case lacked; specifically, that Petitioner had failed to provide any expert testimony establishing a *prima facie* case of malpractice. Pet. App. at 16a. In support of their motion, Respondents provided affidavits from all four of Petitioner's experts. Each affidavit stated there was no malpractice by any of the Respondents. C.A. App. at 40-50.

In Petitioner's opposition to Respondents' summary judgment motion, Petitioner made a conclusory assertion that two of his treating physicians, Dr. James and Dr. Morrison, would opine that Respondents had breached the standard of care. Pet. App. at 19a. Neither of these treating physicians had been named as an expert witness in Petitioner's Rule 26(b)(4) Statement, however. *See* C.A. App. at 38; Pet. App. at 3a. Moreover, Petitioner provided no evidence, *by affidavit or otherwise*, to support his assertion that the physicians would indeed so testify. Thus, the only evidence before the trial court was that the Respondents did not violate any standard of care. Accordingly, Respondents' motion for summary judgment was granted.

Petitioner appealed the granting of summary judgment, contending that the trial court erred in failing to advise him of the need to file affidavits with his opposition to the motion for summary judgment. The District of Columbia Court of Appeals affirmed the trial court's decision, holding that under the circumstances presented the trial court had no duty to advise Petitioner of deficiencies in his opposition to Respondents' motion, specifically including the importance of filing controverting affidavits. Pet. App. at 2a.

A. The petition misrepresents whether a federal question is properly presented.

The District of Columbia Court of Appeals made clear in this case that, under the law of the District of Columbia, *pro se* litigants should not ordinarily expect special treatment simply because of their *pro se* status. Pet. App. at 5a. In setting forth that principle of law, the D.C. Court of Appeals included citations to decisions from other state courts, as well as cases from the United States Court of

Appeals for the District of Columbia Circuit and other federal circuits. Petitioner misconstrues the illustrative use of these cases as presenting a "federal question." *See, e.g.*, Pet. at 4. Petitioner is incorrect.

The law of the D.C. Circuit federal court, while helpful in interpreting local rules patterned after the Federal Rules of Civil Procedure, is not controlling authority for the District of Columbia Court of Appeals. *See M.A.P. v. Ryan*, 285 A.2d 310 (D.C. App. 1971). The mere citation of federal case law in support of an opinion based solely on state law grounds does not present a federal question.

Petitioner also presents several alleged "federal questions," such as his reference to the equal protection clause of the United States Constitution. *See, e.g.*, Pet. at 5. Whether or not such claims would constitute "federal questions" for review if properly raised, there is no federal question to be reviewed by this Court because such claims were never considered by the Court of Appeals. Despite Petitioner's assertions to the contrary, no federal question was raised below.

Petitioner asserts the D.C. Court of Appeals rejected his equal protection argument. Pet. at 5. The record in this case, however, establishes that Petitioner made no such argument before the D.C. Court of Appeals. Petitioner also asserts he contended that Rule 56 violated the due process clause of the Fifth Amendment. *Id.* Again, the record shows that no such argument was presented to the D.C. Court of Appeals. It is settled law that a litigant may not raise for the first time on appeal arguments not presented to the lower court for consideration. *See, e.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

In short, there is no federal question properly before this Court to review. Any "federal questions" proffered by Petitioner were not presented to the lower court and did not form the basis of the lower court's decision. Moreover, contrary to Petitioner's claims, *e.g.*, Pet. at 5, the Court of Appeals did not hold that prisoner *pro se* litigants were entitled to notice of the need for controverting affidavits, but non-prisoner *pro se* litigants were not. Rather, the Court of Appeals held that, for reasons going far beyond Petitioner's status as a non-incarcerated *pro se* litigant, the trial court had no affirmative duty to assist Petitioner in presenting his case by instructing Petitioner on the need for controverting affidavits. The lower court's holding turned on the circumstances presented by this individual case, not the mere status of the *pro se* litigant. Pet. App. at 7a (noting Petitioner's proposed requirement "goes too far in the circumstances here").

Petitioner misreads the D.C. Court of Appeals' rejection of Petitioner's argument regarding procedures used in cases involving prisoner *pro se* litigants as setting forth a ruling of law that prisoner *pro se* litigants constitute a "special class," to which Petitioner does not belong, which is afforded special treatment. Pet. at 21. The D.C. Court of Appeals made no such holding. Rather the D.C. Court of Appeals simply held that Respondents are entitled to judgment as a matter of law given Petitioner's failure to offer any evidence establishing a genuine of material fact supporting Petitioner's claims of medical malpractice.

B. The petition misrepresents this case as arising under a split among the federal circuits.

The Petition misrepresents this case as arising under a split among the federal circuits. Pet. at 21. Similarly to Petitioner's misunderstanding whether this case presents a "federal question," *see supra* at 4, Petitioner's claims on this issue misconstrue the significance of the District of Columbia Court of Appeals' illustrative citation of federal court decisions in affirming the Superior Court of the District of Columbia. This case arises under the state law of the District of Columbia and was decided by a state court.[1]

It is clear that the D.C. Court of Appeals decided this matter on state law grounds. The D.C. Court of Appeals affirmed the trial court's ruling that Petitioner failed to satisfy the requirements of Rule 26(b)(4) of the Superior Court Rules of Civil Procedure regarding disclosure of Petitioner's proffered expert testimony. The D.C. Court of Appeals also affirmed the trial court's ruling that, in responding to Respondents' motion for summary judgment under D.C. Superior Court Rule 56, Petitioner's reliance on mere conclusory statements that he would elicit expert testimony at trial from his treating physicians that the Respondents had violated the standard of care is insufficient to establish a genuine issue of material fact regarding an alleged violation of the standard of care and avoid summary judgment under District of Columbia case law and D.C. Superior Ct. Civ. Rule 56.

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1. The District of Columbia Court of Appeals and the Superior Court of the District of Columbia are Article I courts. They are considered state courts for purposes of Supreme Court review. 28 U.S.C. § 1257(b).

As detailed below, there is no cause for this Court's review as the decision below did not consider any federal question and was based upon adequate state grounds. Moreover, this decision does not confront the Court with a split in the circuits since it arises out of a final judgment of a state court decided under substantive state law. Finally, Petitioner's complaint was properly dismissed as it failed to state a *prima facie* case of medical malpractice.

REASONS FOR DENYING THE WRIT

I. The non-federal court below did not consider the alleged federal question presented in the petition and therefore certiorari should be denied.

It is essential to Supreme Court jurisdiction under 28 U.S.C. § 1257 that a substantial federal question was raised below. As stated by this Court in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." This Court has previously held that mere reference to "due process of law" or "the Constitution of the United States" is insufficient. *See, e.g., Bowe v. Scott,* 233 U.S. 658, 664-665 (1914); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Hardy v. Illinois*, 196 U.S. 78 (1904). This Court is not vested with jurisdiction unless a federal question was raised and decided below, *Cardinale v. Louisiana*, 394 U.S. 437 (1969), and this Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

As this Court stated in *Lynch v. New York ex. Rel. Pierson*, 293 U.S. 52, 54 (1934), in discussing a Fourteenth Amendment argument not raised properly in the lower courts,

> Jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that the judgment as rendered could not have been given without deciding it.

Id. at 54.

In the case at bar, Petitioner never raised the issues of any alleged violation of due process or equal protection under the Fifth Amendment in the trial court or in the D.C. Court of Appeals. (Pet. App. 15a-19a). Therefore, a federal question was not properly raised below. Moreover, since such issues were not raised, the alleged Constitutional issues were never addressed at the appellate level below. For both of these reasons, this Court has no jurisdiction over this matter under 28 U.S.C. § 1257.

In the recent case of *Adams v. Robertson*, 520 U.S. 83 (1997), this Court reiterated its long held position that, "with 'very rare exceptions' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 . . . we will not consider a petitioner's federal claim unless it

was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Id.* at 208 (citations omitted). The burden of showing that a federal question was presented below is upon Petitioner. *Id.* In the *Adams* case, the petitioner was unable to demonstrate that an alleged violation of the Due Process Clause of the Fourteenth Amendment was raised below and the writ of certiorari was dismissed as improvidently granted. *Id.* at 210-11. As stated by the *Adams* court, " 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 210 (citing *Webb v. Webb*, 451 U.S. 493, 500 (1981)).

Likewise, in the case at bar, there has been no showing by Petitioner that the court below addressed or based its decision on a federal question. Accordingly, the petition for writ of certiorari should be denied.

II. The decision below was based upon adequate state grounds.

This Court has consistently declined to review a state court judgment which was based on independent state grounds, even if (unlike the case at bar) a federal question was involved and decided below. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

In the case at bar, the D.C. Court of Appeals held that Petitioner failed to meet the requirements of District of Columbia Superior Court Civil Rule 56(e) in opposing Respondents' motion for summary judgment. Pet. App. at 19a. That reason alone was the basis for affirming the

dismissal of Petitioner's lawsuit. While Superior Court Civil Rule 56 is similar to Federal Rule of Civil Procedure 56, any federal case law interpreting the federal rule counterpart to Superior Court Rule 56 is merely instructive as to the interpretation of Superior Court Civil Rule 56. It is not binding. *See Simpson v. Chesapeake & Potomac Telephone Co.*, 522 A.2d 880, 884 n.4 (D.C. 1987); *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 807 (1984).

State procedural rules, which serve as the basis for an appellate decision, are honored as long as they "serve a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443 (1965); *see also Wainwright v. Sykes*, 433 U.S. 72 (1977); *Monger v. Florida*, 405 U.S. 958 at 961-963 (1972); *Douglas v. Alabama*, 380 U.S. 415 (1965). Moreover, a local rule of procedure that does not discriminate against the raising of a federal claim, and is of a substantive nature, will not be disturbed. *Wainwright, supra*, 433 U.S. at 81.

The District of Columbia Superior Court and the District of Columbia Court of Appeals are distinct, non-federal courts for purposes of 28 U.S.C. § 1257. Their procedural rules are given deference and effect, as is case law applying those rules. In its decision in this matter, the District of Columbia Court of Appeals held that D.C. Superior Court Civil Rule 56 does not mandate the trial court to provide *pro se* litigants in civil cases with specific notice of the need to file countervailing affidavits to avoid summary judgment. This state court interpretation of a state court rule of procedure is clearly an adequate state ground for the decision.

III. Any "split in interpretation" among the United States Circuit Courts of Appeal regarding the need for notice to pro se litigants under Federal Rule of Civil Procedure 56 is irrelevant to this state court decision based on state law.

Petitioner has suggested to this Court that a split of authority exists among various United States Circuit Courts of Appeal as to the need to provide notice to a *pro se* litigant of what must be submitted in opposition to a motion for summary judgment under Federal Rule of Civil Procedure 56. *See* Pet. at 13-18. While such a split of authority may exist in the federal court system with respect to the Federal Rules of Civil Procedure, this Petition arises from the decision of a state court. Furthermore, this case arises under the state law of the District of Columbia. The decision of the Superior Court of the District of Columbia was based upon its interpretation of Superior Court Civil Rule 56. While federal law interpreting the Federal Rule counterpart is instructive, it is not controlling. The trial court decision in this case was affirmed by the District of Columbia Court of Appeals, on the basis of its interpretation of the District of Columbia Rules of Civil Procedure.

This is not a case where a state court and a Federal Circuit Court of Appeal disagree on the interpretation of a federal statute or a question of federal law. As noted above, this case involves application of a state court rule of procedure by a state court. Any disagreement that may exist among certain United States Circuit Courts of Appeal as to Federal Rule of Civil Procedure 56 is irrelevant to the decision of a state court based upon state law grounds.

IV. Non-incarcerated pro se litigants are not denied access to the Courts by lack of a Rule 56 notice as Superior Court Civil Rule 56 is clear on its face.

Petitioner argues that *pro se* litigants are denied access to the courts due to the lack of a separate Rule 56 notice regarding countervailing affidavits. This statement pre-supposes that non-incarcerated *pro se* litigants should not be bound by the same procedural rules as all others. It also pre-supposes that Superior Court Civil Rule 56 is unclear or that the properly given notice in a adversary's motion that it is made under Superior Court Civil Rule 56 is unclear. This Court in *McNeil v. United States*, 508 U.S. 106 (1993), held that civil litigants seeking money damages are not to be treated differently. The exceptions to this general rule are limited to narrow circumstances including pleading matters, including timely service of process; remedial statutes involving civil rights; and incarcerated litigants. Pet. App. at 7a. The Petition does not involve any of those exceptions, although Petitioner would like the Court to treat him as an incarcerated *pro se* litigant.

The reasoning behind the differing treatment of incarcerated *pro se* litigants was clearly set forth by the D.C. Circuit Court of Appeals in *Hudson*, *supra*. The *Hudson* Court noted that incarcerated litigants are under "handicaps . . . [which] detention necessarily imposes upon a litigant." *Id.* at 1094 (citing *Phillips v. United Sates Board of Parole*, 122 U.S. App. D.C. 235, 325 F.2d 711 (1965)). Petitioner has demonstrated no basis for inclusion in one of these categories or that a basis exists to modify these exceptions.

Petitioner's Complaint was dismissed by the District of Columbia Superior Court based on the Superior Court's

application of Superior Court Civil Rule 56. C.A. App. at 15. In affirming the dismissal, the District of Columbia Court of Appeals noted that the "[Respondents'] motion gave a clear explanation of what the case lacked [expert testimony as required by [Rules 16 and 26(b)(4)]" Pet. App. at 3a. The D.C. Court of Appeals quoted the trial court's decision regarding Superior Court Civil Rule 56(e)'s clear mandate that " an adverse party must not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided for in this Rule, must set forth specific facts showing there is a genuine issue for trial." Pet. App. at 3a. Petitioner did not comply with the plain and unambiguous language of this state court Rule and Petitioner's claim was treated accordingly.

The District of Columbia Courts of Appeals correctly held that, under Superior Court Rule 56, *pro se* non-prisoners are not entitled to special notice of how to oppose a summary judgment motion, Pet. App. at 11a. The D.C. Court of Appeals, while recognizing that parties may represent themselves, reiterated the "principle that 'such a litigant can expect no special treatment from the court.' " Pet. App. at 11a (citing *Abell v. Wang*, 697 A.2d 796, 804 (D.C. 1997)). The D.C. Court of Appeals went on to state,

> Our own federal appellate circuit court, in an opinion by then Judge Scalia, has explained that "[a]t least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration (citations omitted)". While such a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts. . . .

Pet. App. at 11a (citing *Dozier v. Ford Motor Co.*, 227 U.S.App.D.C. 1, 6, 702 F.2d 1189, 1194 (D.C. Cir. 1993)). The D.C. Court of Appeals went on to delineate three categories requiring special treatment of *pro se* litigants: pleading matters, including timely service of process; remedial statutes involving civil rights; and, lastly, incarcerated litigants. Pet. App. at 7a.

The specialized situation of *pro se* incarcerated litigants, which was at issue in many of the cases relied on by Petitioner, is irrelevant to the case at bar. While the D.C. Court of Appeals has recognized that special consideration must be given to *pro se* incarcerated litigants under the holding in *Hudson v. Hardy*, 134 U.S. App. D.C. 44, 412 F.2d 1091 (1968) (as binding on it under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)), the D.C. Court of Appeals in this case specifically considered the facts of this case in ruling that Petitioner is not entitled to such special consideration. In so holding, the D.C. Court of Appeals relied on this Court's statement, in *McNeil v. United States*, 508 U.S. 106, 113 (1993), that, "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." Pet. App. at 8a.

The D.C. Court of Appeals also cited with approval the reasoning of the United States Court of Appeals for the Ninth Circuit analysis in *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.4 (9th Cir. 1986), for not imposing a burden on trial courts to act as an advisor for non-incarcerated *pro se* litigants on matters of litigation process. Pet. App. at 13a. The *Jacobsen* court stated that imposing such a role on trial courts would be improper for several reasons,

> First and foremost is that pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their counsel of choice, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently. In both cases, the remedy to the party injured by his representative's error is to move to reconsider or to set aside; it is not for the trial court to interject itself into the adversary process on behalf of one of a class of litigant.
>
> Imposing an obligation to give notice of Rule 56's evidentiary standards would also be to invite an undesirable, open-ended participation by the court in the summary judgment process . . . Unlike the conversion of a 12(b)(6) motion into a motion for summary judgment, which only requires notice of what the motion now *is*, Jacobsen's proposal requires advice as to what the motion must *mean*. To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee.

Jacobsen, 790 F.2d at 1365-66 (emphasis in original) (footnotes omitted).

As this Court stated in *McNeil*, *supra*, 508 U.S. at 113 (citing to *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

V. The dismissal of petitioner's complaint was correct due to petitioner's failure to present a prima facie case of medical malpractice under the case law of the District of Columbia.

Under governing District of Columbia law, to prevail in a medical malpractice case, a plaintiff must establish: (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) a causal relationship between that deviation and the plaintiff's injury. *Woldeamanuel v. Georgetown University Hospital*, 703 A.2d 1243, 1244 (D.C. 1997) (quoting *Meek v. Shepard*, 484 A.2d 579, 581 (D.C. 1984)); *accord Washington v. Washington Hospital Center*, 579 A.2d 177, 181 (D.C. 1990); *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619, 623-624 (D.C. 1986).

Because these issues are related to some distinct science, profession, or occupation, expert testimony is usually required to prove each of these elements. *Washington, supra*, 579 A.2d at 181; *Psychiatric Institute, supra*, 509 A.2d at 623-24; *Woldeamanuel, supra,* 703 A.2d at 1244; *Allen v. Hill*, 626 A.2d 875, 877 (D.C. 1993). Thus, in order for a *prima facie* case of medical malpractice to be established expert testimony is needed. In the *Woldeamanuel* case, the D.C. Court of Appeals held that a litigant's allegations of medical malpractice, unsupported by anything other than her own conclusory allegations and unsworn testimony of a physician, is insufficient to defeat a motion for summary judgment. *Id.* at 1245.

In the case at bar, expert witness disclosure requirements are governed by D.C. Superior Court Civil Rule 26(b)(4), which requires the pretrial disclosure of all expert witness testimony that the parties intend to present at trial. As the

trial court and the D.C. Court of Appeals recognized, applying this Rule in the context of established District of Columbia law, a statement from an expert supporting the Petitioner's claim of malpractice was required for the trial court to find a genuine issue of material fact sufficient to defeat the Respondents' motion for summary judgment under Superior Court Civil Rule 56. As in *Woldeamanuel*, summary judgment in the case at bar was appropriate based on the Petitioner's complete failure to offer proof concerning the standard of care and any alleged breach of the standard of care, and the alleged causal nexus between the breach and Petitioner's injuries.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 99-967

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IN THE
SUPREME COURT OF THE UNITED STATES

ALBERT G. MACLEOD,
Petitioner,

v.

GEORGETOWN UNIVERSITY
MEDICAL CENTER, *et al,*
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents do not contest that Petitioner's due process and equal protection arguments present significant constitutional issues on which the lower courts are deeply divided -- a split that will remain until resolved by this Court. Nor do Respondents contest that substantial numbers of *pro se* parties are losing their substantive rights due to their inability to understand their procedural obligations under Rule 56. Neither do they dispute that the District of Columbia Superior Court provides Rule 56 notice to *all pro se* prisoners, but *not to all pro se* non-prisoners.

Instead, Respondents devote the vast majority of their Opposition (Opp. 3-11) to the claim that this Court lacks jurisdiction. Respondents claim there is no reason for granting certiorari *only* because the constitutional questions raised in the Petition were not raised below, and therefore the Court of Appeals' decision was based solely on state grounds. This claim is factually and legally without merit. For example, with regard to his due process claim, Petitioner argued before the Court of Appeals that "[i]ndividuals who are appearing *pro se* must be 'given sufficient information to participate in the trial process effectively,'" (App. Br. 8); that "reasonable opportunity presupposes notice," (*id.* 9); that "[t]he form of notice must be sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required," (*id.* 10); that "this aspect of . . . civil procedure practice is contrary to lay intuition," (*id.* 9); that "[i]t would be unrealistic to impute to a non-prisoner without legal training . . . an instinctual awareness [of his procedural obligations under Rule 56]," (App. Rep. Br. 8); and that "[h]ere a technical (and counter-intuitive) rule of procedure was elevated over a rule of fundamental justice and in the process a *pro se* litigant was deprived of his right to have his case heard on the merits," (*id.* 12). Similarly, with regard to

his equal protection claim, Petitioner argued that "it would be anomalous for a *pro se* felon to be entitled to greater notice and leniency than a *pro se* law abiding citizen asserting the identical claim," (*id.* 8); that "indigent plaintiffs have no more freedom of choice as to legal representation than do prisoners," (App. Br. 10); and that "[w]e do not think there is any rational basis for distinguishing between prisoner *pro se* litigants and general *pro se* litigants when it comes to the application of the [Rule 56] notice rule," (*id.*). Indeed, Respondents acknowledge (Opp. 12-15) at least indirectly that the Court of Appeals actually decided the two issues presented by the Petition, which creates an independent basis for jurisdiction in this Court.

Respondents contend that the Court of Appeals correctly decided these two issues based on the same Circuit decisions, which create the conflict referred to in the Petition. (*Compare* Opp. 12-15 *with* Pet. 16-17, 24-29). In short, Respondents argue the merits of the conflict among the Circuits for each of the two issues presented, but this argument does not detract from the compelling reasons for granting the review set forth in the Petition (at 6-9) -- reasons which Respondents do not challenge in any respect.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 BASED ON THE TWO CONSTITUTIONAL ISSUES PRESENTED BECAUSE THESE ISSUES WERE BOTH PRESSED AND PASSED UPON BELOW.

Respondents correctly observe (Opp. 3-4, 7) that mere reference to "the Constitution" or "due process" in the lower courts is insufficient to obtain jurisdiction in this Court. However, Petitioner's claim to jurisdiction is based on two different, independent grounds. First, these two constitutional issues were adequately presented to the

Court of Appeals and second, the Court of Appeals rejected these arguments, which denied Petitioner his rights under the Constitution.

A. The Due Process And Equal Protection Issues Were Adequately Presented Below.

With respect to the both issues presented before this Court, Petitioner identified before the Court of Appeals the same key federal circuit cases and circuit court split as here. To that end, Petitioner not only presented these issues with supporting arguments -- in addition to those few examples quoted in the Introduction, (*supra* 1-2) -- but did so in the context of the foregoing circuit court split of authority. (App. Br. 8-10; App. Rep. Br. 3-6).

For example, in relying on *Moore v. Agency for Int'l Development*, 994 F.2d 874, 876 (D.C. Cir. 1993), Petitioner argued below that "courts have long-recognized the importance of providing *pro se* litigants with a meaningful opportunity to participate in the judicial process and that notice of technical procedures is critical in affording a meaningful opportunity," (App. Rep. Br. 8-9). Petitioner also argued that the D.C. Superior Court provided a *pro se* manual that "did not explain . . . the summary judgment rule" requirement of submitting counter-affidavits -- it only stated (which is blatantly misleading) that he had to send a one page statement and implies that evidentiary statements are not necessary, (App. Rep. Br. 11; Pet. App.20a-21a), and as a result, "a technical (and counter-intuitive) rule of procedure was elevated over a rule of fundamental justice, and in the process a *pro se* litigant was deprived of his right to have his case heard on the merits," (*id.* 12). Furthermore, Petitioner argued that "[r]ules of procedure do not require sacrifice of the rules of fundamental justice," (*id.*). Indeed, these last two statements in and of themselves should have been sufficient to alert the Court of Appeals to Petitioner's

reliance on due process principles. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) ("Petitioner's contemporaneous objection to the refusal of his request[ed jury instruction] . . . invoked 'fundamental principles of judicial fair play.' This should have sufficed to alert the trial judge to petitioner's reliance on due process principles.").

Similarly, Petitioner argued that the Seventh Circuit's holding in *Timms v. Frank*, 953 F.2d 281, 285-286 (7th Cir. 1992), correctly rejected the Ninth Circuit's holding in *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986), by expressly holding that "all *pro se* litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion," (App. Br. 10, n.2). Petitioner also argued that under *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971), the D.C. Superior Court is required to and in fact does provide the *Hudson v. Hardy*, 421 F.2d 1091 (D.C. Cir. 1968), Rule 56 notice to *all pro se* prisoners, and that there was no "rational basis for distinguishing between prisoner *pro se* litigants and general *pro se* litigants when it comes to the application of the notice rule," (App. Br. 10, n.2; App. Rep. Br. 8). In addition, Petitioner addressed the issue of cost in an equal protection context by demonstrating that the cost to provide equal protection to the two groups of *pro se* parties "would be minuscule," and "would not be onerous for the [D.C.] superior court to administer," (App. Br. 12).

Thus, this Court has jurisdiction not because of any constitutional labels or "particular form of words or phrases," but rather, because both issues were "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *accord Street v. New York*, 394 U.S. 576, 584-585 (1969); *see Taylor*, 436 U.S. at 483. Finally, although it is correct that Petitioner has added further support in his Petition for the two issues presented below, that fact does not deprive

this Court of its jurisdiction over the Petition. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

B. The Court Of Appeals Decided The Two Issues Presented And There Is No Independent State Basis For The Court Of Appeals' Decision.

The fact that these same two issues presented here were raised below is also demonstrated by a review of the Court of Appeals' decision (Pet. 5, App. 1a-14a). For example, with regard to Petitioner's Due Process claim, the Court of Appeals stated that "as far as this record shows, appellant chose to proceed *pro se*," (*id.* 12a); that despite "his comment in the surreply . . . indicating his mis-understanding of the pretrial process and summary judgment," there was "no reason why he should not have known by this point that he had to make at least a minimal disclosure of the substance of the evidence with which he was to prove his case," (*id.* 12a-13a); that "the failure of a *pro se* litigant to take some particular step can almost always be ascribed to a misunderstanding of an applicable legal requirement," and thus, "[a] litigant's making explicit that which is implicit does not change the fundamentals of our analysis," (*id.* 13a); that "the present federal rules [from where Civ. Rule 56 is derived] . . . already apprise litigants of their summary judgment obligations," (*id.*); that "appellant here was at liberty, he was literate, and he clearly had access to legal materials as demonstrated by his motions and other submissions throughout discovery," (*id.* 11a); that "[t]o give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee," (*id.* 14a); that the Superior Court cannot be criticized for its *pro se* handbook because it made an effort to help (*id.* 6a) and therefore, the Superior Court's failure to provide Petitioner with notice of his Rule 56 obligations did not entitle him to a reversal of the summary judgment, (*id.* 14a).

Similarly, with regard to Petitioner's Equal Protection claim, the Court of Appeals held that despite the fact that the Superior Court is required to provide the *Hudson* Rule 56 notice to *all pro se* prisoners, such a notice requirement did not apply to *pro se* non-prisoners because "[i]t is the element of 'choice' that most clearly distinguishes the *pro se* prisoner cases from the suit at bar," (*id.* 10a); that "when the unwilling self-representation is coupled with the further obstacles placed in a prisoner's path by his incarceration . . . it seems appropriate to apply the requirements of the summary judgment rule with less than 'strict literalness,'" (*id.*), and therefore, the Superior Court's failure to provide Petitioner with notice of his Rule 56 obligations was justified and did not entitle him to a reversal of the summary judgment, (*id.* 14a).

In addition, Respondents' Opposition (Opp. 12-15) demonstrates that these issues were decided below: Respondents embrace the Court of Appeals' analysis which rejected these two issues and relied upon the same Circuit decisions that create the conflict relied upon by Petitioner to demonstrate the split of authority. (Pet. 5, 16-17). Indeed, the fact that the Court of Appeals decided these same two issues provides an independent basis for jurisdiction under 28 U.S.C. § 1257. *See Cohen v. Cowles*, 501 U.S. 663, 667 (1991); *accord United States v. Williams*, 504 U.S. 36, 45 (1992). Finally, the fact that the Court of Appeals found that the summary judgment was appropriate because Petitioner failed to submit countering-affidavits (Opp. 10, 16-17) does not create an independent state ground because the absence of that evidence is directly related to the violation of Petitioner's constitutional rights. *See Taylor*, 436 U.S. at 483 (even though the Kentucky court decided the issue based on a procedural default, this did not suffice to preclude jurisdiction in this Court where an infringement of a constitutionally-protected right occurred).

II. RESPONDENTS' ARGUMENTS ON THE MERITS DO NOT DIMINISH THE NEED FOR REVIEW ON EITHER ISSUE PRESENTED.

A. The Right To Notice Under The Due Process Clause.

As previously noted, Respondents do not challenge that the Circuits are in disarray on the issue of whether the right of access to the courts, notice, and a reasonable opportunity to participate in the trial process requires Rule 56 notice to all *pro se* parties. As to the merits -- which do not diminish the need for this Court's review -- Respondents (Opp. 13), like the Court of Appeals, claim that notice is not necessary because Rule 56 clearly apprises a *pro se* party of what is required to oppose the motion including the need of counter affidavits, and therefore the mere passing reference to Rule 56 in a motion for summary judgment (which is all that Respondents did below; *compare* C.A. App. 17 *with* 23-27 *and* 66-71) is sufficient. However, this argument not only mischaracterizes the plain language of Rule 56, but it is also at odds with the unchallenged empirical studies referred to in the Petition (at 7, 18-19, 26-27) that demonstrate that there are substantial numbers of *pro se* persons whose substantive rights are being lost because of their lack of understanding of procedural requirements, and the observations of distinguished jurists like Chief Judge Posner that assuming a *pro se* party will understand the need for counter affidavits in opposing a motion for summary judgment is wholly unjustified. *Lewis v. Faulkner*, 698 F. 2d 100, 102 (7th Cir. 1982). Further, this contention is inconsistent with this Court's observations in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), that it is wrong to assume that laymen will have the same understanding of the law as attorneys. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.*

Respondents also argue (Opp. 13-15) that requiring Rule 56 notice to *pro se* non-prisoners impermissibly permits the court to become a "player in the adversary process." But that argument cannot possibly be right. This Court has repeatedly required courts to provide notice and assistance to *pro se* parties in procedural matters and the Circuits, and even the Court of Appeals, require the same without any finding that the court loses its objectivity or becomes a player in the adversary process. (Pet. App. 7a, 9a-10a; Opp. 14). Perhaps the clearest refutation of this argument is that the D.C. Superior Court and all Circuits (except for one) require this same Rule 56 notice to *pro se* prisoners without any concern, let alone a finding, that the court becomes a "player" in the adversary process and thereby loses its neutrality.

Respondents' and the Court of Appeals' reliance on this Court's decision in *McNeil v. United States*, 508 U.S. 106 (1993), and *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1993) to support this neutrality justification is misplaced. Contrary to Respondent's assertion (Opp.12), this Court in *McNeil* did *not* address the issue of notice under the Federal Rules, and indeed recognized (508 U.S. at 113) that circumstances do require treating *pro se* plaintiffs differently from plaintiffs represented by counsel. In that case, this Court only held that the *pro se* status of a party can not justify courts to alter the jurisdictional requirements for standing that Congress mandated. *McNeil*, 508 U.S. at 112-113. Similarly, in *Dozier*, the D.C. Circuit did not even discuss, let alone attempt to limit its *Hudson* Rule 56 notice requirement, nor did that court consider *Dozier* in its subsequent holding in *Moore*, 994 F.2d at 874, that the *Hudson* Rule 56 notice applies to all *pro se* parties. In *Dozier*, a *pro se* complaint was dismissed for lack of subject matter jurisdiction. The *pro se* party refiled the same complaint which was again dismissed. In affirming the second dismissal, the D.C. Circuit held that the *pro se* status could

not be relied upon in the *second* action -- not because *pro se* parties are not entitled to assistance from the court as Respondents argued, but because the first district court had given the *pro se* party "assist[ance]" concerning the jurisdiction issue, and the *pro se* party -- who was an "attorney" -- stated he "understood" the significance of the district court's assistance. *Dozier*, 702 F.2d at 1195. By stark contrast, here the D.C. Superior Court provided a *pro se* manual that is blatantly misleading in describing a *pro se* party's obligations in responding to a motion for summary judgment (Pet. App. 20a-21a), failed to offer any helpful assistance, and when Petitioner expressly stated his fundamental *misunderstanding* of his obligations under Rule 56, i.e. that he believed he did not have to submit the expert testimony from his identified treating physicians at that time, (C.A. App. 57; Opp. 3), the Court did not offer any assistance like the initial court in *Dozier* and instead dismissed his case with prejudice for failing to submit that expert testimony in affidavit form as required by Rule 56.

B. The Right To Be Treated The Same As *Pro Se* Prisoners By The D.C. Superior Court.

Respondents correctly acknowledge (Opp. 14) that the D.C. Superior Court is required to give all *pro se* prisoners the *Hudson* Rule 56 notice when a summary judgment motion is filed against them. However, Respondents' attempt (Opp. 5) to create the appearance that there is a lack of unequal treatment is without merit. The invidious discrimination is undeniable because *Hudson* does not permit an analysis of the circumstances to determine whether notice is required for *pro se* prisoners, but rather requires Rule 56 notice to be provided to *all pro se* prisoners, *Hudson*, 421 F.2d at 1094-1095, and the absence of that notice is critical because the Superior Court *pro se* manual (Pet. App. 20a-21a) provides no Rule 56 notice. Indeed, as the D.C. Circuit later explained, the reason why an analysis

of the particular circumstances of a *pro se* prisoner is prohibited is because the right to "participate in the trial process effectively" is a fundamental right which requires that all *pro se* litigant prisoners and non-prisoners alike, be "given sufficient information" to protect this right. *See Moore*, 994 F.2d at 876.

Respondents' reliance on *Hudson* (Opp. 12) to justify the disparate treatment here is misguided. As explained above, the D.C. Circuit in *Moore* does not agree that the purported "handicaps" referred to in the *Hudson* decision were material to its holding that all *pro se* parties need court-ordered notice. *Moore*, 994 F.2d at 876. Moreover, like the Court of Appeals, Respondents (Opp. 14-15) attempt to justify the different treatment given to *pro se* non-prisoners based on a contention of preserving the court's neutrality. This contention, even if correct, is misguided for purposes of responding to Petitioner's equal protection question because the D.C. Superior Court provides Rule 56 notice to *all pro se* prisoners and therefore whether or not such notice to all *pro se* non-prisoners would fail to preserve its neutrality for them is irrelevant to this invidious discrimination.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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